Supreme Court, U.S.
FILED

041687 JUN 13 2005

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT M. DAVIDSON and
VANESSA E. KOMAR,
Petitioners

v.

VIVRA INC,
MICHAEL J. MEEHAN,
QUARLES BRADY STREICH LANG LLP,
et al
Respondents

On Petition For Writ Of Certiorari
As to Two Final Judgments of the Ninth Circuit
United States Court of Appeals

PETITION FOR WRIT OF CERTIORARI

ROBERT M. DAVIDSON
Petitioner Pro Se
1009 N. 4th Street, Ste. B
Longview, TX 75601
903-758-1900

Preface

Pursuant to 28 U.S.C. Section 1254, 28 U.S.C. Section 1651, 28 U.S.C. Section 1257, 28 U.S.C. Section 2101(c), and Supreme Court Rules 10, 12-14, this petition seeks *review on writ of certiorari* to the United States Supreme Court of two final judgments of the U.S. Court of Appeals Ninth Circuit. These judgments each draw in question the validity of Rule 5.1 of the Arizona Rules of Civil Procedure on the ground of being unconstitutional on its face or as applied. There is a long-standing split of authority between the circuits regarding *the right to legal counsel in civil lawsuits* which urges review by this Court. Extraordinary circumstances exist which urge review by this Court. The Petitioners have suffered irreparable injury.

Questions Presented For Review

1. Should Davidsons' request for compensatory damages have precluded dismissal under *Younger* doctrine?
2. Was dismissal inappropriate because Davidsons' allegations stated a constitutional claim against their privately-retained attorney and his law firm?
3. Were Davidsons precluded from raising federal law claims in the state forum?
4. Did withdrawal of counsel in the State Action deprive Davidsons of federal constitutional rights?
5. Does the "*extraordinary circumstances*" exception to *Younger* abstention apply?
6. Is Rule 5.1 of the Arizona Rules of Civil Procedure unconstitutional on its face or as applied to Davidsons?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA

Petitioners
ROBERT M. DAVIDSON; and
VANESSA E. KOMAR

Respondents
VIVRA INC;
MICHAEL J. MEEHAN;
QUARLES BRADY STREICH LANG LLP;
VIVRA ASTHMA ALLERGY INC;
VIVRA ASTHMA ALLERGY CARE AMERICA OF ARIZONA PC;
MAGELLAN SPECIALTY HEALTH INC;
ALLIED SPECIALTY CARE SERVICES INC;
VIVRA HOLDINGS INC;
TEXAS PACIFIC GROUP INC;
GAMBRO HEALTHCARE INC;
DIALYSIS HOLDINGS INC;
I-HEALTH TECHNOLOGIES INC;
ALBANY MEDICAL COLLEGE;
JAY GROSSMAN;
EUDICE GROSSMAN;
THOMAS B. EDWARDS;
GAYLE F. PETRILLO;
CHARLES W. OTT;
TIMOTHY G. WIGHTON;
JOHN W. STRACK;
LYNDA L. NESSINGER;
RICHARD M. HASSETT;
JAMES L. SUBLETT; and
LEANNE M. ZUMWALT

NOTICE TO CLERK OF THIS COURT:

It is the Petitioners' belief that VIVRA INC, MAGELLAN SPECIALTY HEALTH INC, and ALLIED SPECIALTY CARE SERVICES INC, no longer have an interest in the outcome of the Petition because these defendants ONLY were dismissed from the appeal by mandate of the 9th Circuit Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
APPENDIX v
CITATIONS TO OPINIONS AND ORDERS BELOW 1
STATEMENT OF JURISDICTION 1
RELEVANT CONSTITUTIONAL PROVISIONS 2
STATEMENT OF THE CASE 2
ARGUMENT FOR ALLOWANCE OF WRIT 7

I. Davidsons' request for compensatory damages should have precluded dismissal under *Younger* doctrine..... 7

II. Dismissal was inappropriate because Davidsons' allegations stated a constitutional claim against their privately-retained attorney and his law firm..... 8

III. Davidsons were precluded from raising federal law claims in the state forum 15

IV. Withdrawal of counsel in the State Action deprived Davidsons of federal constitutional rights 20

IV. The "*extraordinary circumstances*" exception to *Younger* abstention applies 22

V. Rule 5.1 of the Arizona Rules of Civil Procedure is unconstitutional on its face or as applied to Davidsons 23

CONCLUSION..... 29
APPENDIX App.1

TABLE OF AUTHORITIES

CASES

Younger v. Harris, 401 U.S. 37 (1971)	5,20
Gilbertson v Albright, 381 F.3d 965	8
Canatella v. California, 404 F.3d 1106	8
Pugliano v. Staziak, 231 F. Supp. 347	10
Briley v. State of Cal., 564 F.2d 849	10,11,13
Minns v. Paul, 542 F.2d 899	11
Carruth v. Geddes, 443 F. Supp. 1295	13
Fidelity Natl. Title Co. v. Intercounty Natl. Title Co.,310 F.3d 537	13
Parratt v. Taylor, 101 S.Ct. 1908	13
Whiting v. Lacara, 187 F.3d 317	14
Richardson-Merrell Inc. v. Koller, 105 S.Ct. 2757	14
Lebbos v. Judges of Superior Court, 883 F.2d 810	19
Dubinka v. Judges of Superior Court, 23 F.3d 218	20
Martin-Marietta Corp. v. Bendix Corp., 690 F.2d 558	22
Thomas v. Fiedler, 700 F. Supp. 1527	22
U.S. v. Sardone, 94 F.3d 1233	23
Hedges v.Resolution Trust Corp., 32 F.3d 1360	23
City of Houston, Tex. v. Hill, 482 U.S. 451 (1987)	25

CONSTITUTION AND STATUTES

28 USC Section 1254	1
28 USC Section 1651	1
28 USC Section 1257	1
28 USC Section 2101 (c)	1
28 USC Section 1257	1
28 USC Section 2101 (e)	1
18 USC Section 1964 (a) and (c)	3,8
18 USC Section 1962 (b), (c), and (d)	3
18 USC Section 1951	19
28 USC Section 1331	5
28 USC Section 1367	5
Fed. R. Civ. P., Rule 8	4,5
Prescription Drug User Fee Act	6,17-20,23
Ariz. R. Civ. P., Rule 5.1	3,7,9-11,14,16,21-30
Ariz. R. Civ. P., Rule 13, 15, 19	16
U.S. Supreme Court Rules 10, 12-14	1
U.S. Const., Amend. V	21,24

U.S. Const., Amend VI 21,24

U.S. Const., Amend XIV 21,24

U.S. Const., Article I, Section 8 (3) 2

U.S. Const., Article I, Section 10 (1) 21,24

18 USC Section 1964 (a) and (c) 8

18 USC Section 1962 (b), (c), and (d) 4

42 USC Section 1983, 1985, 1988 8,11,14,22

MISCELLANEOUS

Arizona Civil Rules Handbook, 2002 Edition, by Daniel J. McAuliffe, at page 85 26

15 Am. Jur 2nd Civil Rights Section 72, Richard B. Gallagher, et al. 9

44 A.L.R. Fed. 547, Ethel R. Alston 10

36 A.L.R. Fed. 594, at pg 18 , Catherine R. Lazuran 14

APPENDIX

APPENDIX A: Final Judgment and Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 03-17342).....App. 1
APPENDIX B: Final Judgment and Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 04-15304).....App. 4
APPENDIX C: Final Judgment of November 26, 2004, from Pima County Superior Court, Case No.C333954.....App. 7
APPENDIX D: Mandate of Arizona Court of Appeals of November 26, 2003, (# 2 CA-CV 2002-0051).....App. 9
APPENDIX E: Ariz. R. Civ. P., Rule 5.1 (A)(2) (B) and (C).....App. 10
APPENDIX F: Order, November 24, 2003, U.S. District Court, Arizona District, Docket No. 56, Civil Case # CV-03-00110-FRZ.....App. 11
APPENDIX G: Order, February 2, 2004, U.S. District Court, Arizona District, Docket No. 9, Civil Case # CV-03-00580-FRZ.....App.15
APPENDIX H: Minute Entry, In Chambers Ruling, File Stamp Date: April 29, 2004, Pima County Superior Court, Case No. C333954.....App. 20
APPENDIX I: Memorandum Decision, Appeal Dismissed, February 27, 2003, Arizona Court of Appeals, Division Two, Case No. 2 CA-CV 2002-0051.....App. 23
APPENDIX J: Order, Arizona Supreme Court re: action taken August 8, 2003; ORDERED: Petition for Review to Supreme Court = DENIED. FURTHER ORDERED: Request for Attorneys' Fees [Appellees Grossman] = GRANTED, Arizona Supreme Court Case No. CV-03-0148-PR.....App. 27
APPENDIX K: Copy of 9th Circuit ORDER: case is dismissed as to appellees Vivra Inc, Magellan Specialty Health Inc, and Allied Specialty Care Services LLC f/k/a Allied Specialty Care Services Inc ONLY.....App. 28

CITATIONS TO OPINIONS AND ORDERS BELOW

1. Final Judgment and Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 03-17342)
2. Final Judgment and Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 04-15304)
3. Final Judgment of November 26, 2004, from Pima County Superior Court, Case No. C333954
4. Mandate of Arizona Court of Appeals of November 26, 2003 (# 2 CA-CV 2002-0051)
5. Order, November 24, 2003, U.S. District Court, Arizona District, Docket No. 56, Civil Case # CV-03-00110-FRZ
6. Order, February 2, 2004, U.S. District Court, Arizona District, Docket No. 9, Civil Case # CV-03-00580-FRZ
7. Minute Entry Order , April 29, 2004, In Chambers Ruling, Pima County Superior Court, Case No. C333954
8. Memorandum Decision, Appeal Dismissed, February 27, 2003, Arizona Court of Appeals, Division Two, Case No. 2 CA-CV 2002-0051
9. Minute Entry Order of Arizona Supreme Court re: action taken August 8, 2003; ORDERED: Petition for Review to Supreme Court = DENIED. FURTHER ORDERED: Request for Attorneys' Fees [Appellees Grossman] = GRANTED, Arizona Supreme Court Case No. CV-03-0148-PR
10. Certified Copy of 9th Circuit Mandate: case is dismissed as to appellees Vivra Inc, Magellan Specialty Health Inc, and Allied Specialty Care Services LLC f/k/a Allied Specialty Care Services Inc ONLY. U.S. District Court, Arizona District, Case No. CV-03-00110-FRZ, Docket # 61 entered on April 16, 2004.

BASIS FOR JURISDICTION IN U.S. SUPREME COURT

This petition is filed under 28 U S.C. Section 1254, 28 U.S.C. Section 1651, 28 U.S.C. Section 1257, 28 U.S.C. Section 2101(c), and Supreme Court Rules 10, 12-14.

Two final judgments sought to be reviewed were entered by the U.S. Court of Appeals, Ninth Circuit, on April 4, 2005, (03-17342), and on April 4, 2005, (04-15304). This petition is filed under this Court's Rule 10 and 28 U.S.C. Section 2101 (c).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution provides: *"Nor shall [any person] be deprived of life, liberty, or property,*

without due process of law; nor shall private property be taken for public use, without just compensation".

The Sixth Amendment of the United States Constitution provides: *"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense".*

The Fourteenth Amendment of the United States Constitution provides: *"No state shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".*

Article I, Section 10 (1) of the United States Constitution provides:*"No State... shall pass any... Law impairing the Obligation of Contracts".*

Article I, Section 8 (3) of the United States Constitution provides: *"The Congress shall have the power to regulate commerce...among the several states".*

STATEMENT OF THE CASE

The State court proceeding began when Jay Grossman, M.D. and his spouse Eudice Grossman (referred to collectively as "the Grossmans") filed a Complaint against Robert M. Davidson, M.D. and his spouse Vanessa E. Komar, R.N. (referred to collectively as "the Davidsons") on July 2, 1999, in Pima County Superior Court (the "State court proceeding"), alleging defamation and intentional infliction of emotional distress. On October 13, 1999, Michael J. Meehan ("MJM"), then of the law firm Meehan and Associates, entered into an attorney-client relationship with the Davidsons in connection with the litigation initiated on July 2, 1999. It was agreed by MJM that he would file compulsory counterclaims of assault and battery (in the workplace) against the Grossmans. It was further agreed that MJM would bring on behalf of the Davidsons, such other legally-cognizable causes of action against the Grossmans, as would be supported by discovery of the nucleus of operative facts from which the state court proceeding arose. On April 28,2000, the Davidsons counterclaimed with charges of assault and battery.

Davidsons retained the legal service of the Law Office of Kenneth Joel Haber, P.C. on August 30, 2000, to review the nucleus of operative facts that gave rise to the State court proceeding, and to opine legally as to whether the Davidsons have (or at minimum, had) a viable federal civil RICO cause of action.

On November 20, 2000, Kenneth Haber provided a copy of their "Prosecution Memorandum" to the Davidsons.

This Court may take judicial notice of the Prosecution Memorandum of November 20, 2000, provided by Kenneth Haber to the Davidsons. This is a document of readily verifiable authenticity which provides this Court with prima facie evidence that the Grossmans' filing of the State court proceeding and MJM's filing of the Motion to Withdraw as counsel of record in the State court proceeding, were both motivated by *bad faith*. See Motion for Judicial Notice of Prosecution Memorandum, on June 11, 2004, in Ninth Circuit Case 04-15304.

On February 1, 2001, MJM, then of the law firm Quarles & Brady Streich Lang ("QBSL"), filed Notice of Change of Law Firm in the State court proceeding. On December 17, 2001, four months before the scheduled trial date in the State court proceeding, MJM and QBSL filed Motion to Withdraw as Counsel of Record and Continue Trial in the State court proceeding, citing Ariz. R. Civ. P. Rule 5.1 (A)(2) (B) as statutory authority for their motion to withdraw. On or about January 11, 2002, the Trial Court Ordered that attorney withdrawal and continuance of the State court proceeding is granted. On or about February 11, 2002, the Davidsons (proceeding pro se), filed an interlocutory appeal to the Arizona Court of Appeals citing deprivation of fundamental rights by the Trial Judge's Order of January 11, 2002, including the rights of Due Process and Equal Protection under the 14th Amendment of the U.S. Constitution.

So as to avoid lapsing of relevant statutes of limitations, the Davidsons (again proceeding pro se) filed Plaintiffs' Original Complaint with the U.S. District Court, Arizona District, on February 19, 2003, under 18 U.S.C. Section 1964 (c) for violations of 18 U.S.C. Section 1962 (b), (c), and (d) and pendent state law claims, *for conspiracy to defraud the Davidsons, study subjects, practice patients, and the United States,* against 22 named corporate and individual defendants, alleging 21 counts. On April 30, 2003, the Davidsons filed their First Amended Complaint against the same 22 named defendants, alleging 17 counts.

On June 6, 2003, defendants Grossman appeared and filed "*Defendants Jay and Eudice Grossman's Motion to Dismiss Pursuant to Rule 8, Federal Rules of Civil Procedure.*"

On June 17, 2003, the case was *stayed as to Vivra Inc, Magellan Specialty Health Inc, Allied Specialty Care Services* (referred to collectively as the "Magellan defendants") by the filing of the Magellan defendants' Notice of filing Chapter 11 Bankruptcy (Chapter 11 was filed on March 11, 2003, in the U.S. Bankruptcy Court, Southern District of New York).

On July 1, 2003, the U.S. District Court granted the Grossmans' Motion to Dismiss Pursuant to Rule 8 based on the Court's finding *"that the prolixity of the First Amended complaint renders the pleading incomprehensible."* The Davidsons were *granted leave to file a Second Amended Complaint upon the lifting of the automatic stay* in compliance with the pleading requirements of the Federal Rules of Civil Procedure and in accordance with the provisions of the court's Order. It was further ordered that Defendants Vivra Inc, Magellan Specialty Health Inc, and Allied specialty Care Services LLC **shall file a Petition to Lift Automatic Stay** *upon a final determination of the bankruptcy proceedings*. It was further ordered that the Davidsons are granted leave to file a Second Amended Complaint in compliance with the pleading requirements of the Federal Rules of Civil Procedure **on or before 30 days from the date of the filing of the Petition to Lift Automatic Stay** and to serve it upon defendants in accordance with the Federal Rules of Civil Procedure.

The Davidsons were absolutely prevented from filing a Second Amended Complaint in the Federal court proceeding until 30 days after the Magellan defendants filed a Petition to Lift the Automatic Stay. Not only was the Magellan defendants' petition not forth-coming, the Automatic Stay was replaced by a permanent injunction after their Discharge Confirmation in U.S. Bankruptcy Court. Other than filing a Motion for Preliminary Injunctive Relief to the U.S. District Court, the Davidsons had no legal remedy which would allow them to ever file a Second Amended Complaint in the federal court proceeding. The Trial Judge's Order of July 1, 2003, dismissing the federal court proceeding without prejudice under FRCP Rule 8, had the same effect as a dismissal with prejudice *as to all of the defendants, yet it was not appealable as a final judgment.*

In a Motion for Injunctive Relief to the U.S. District Court on or about October 21, 2003, the Davidsons asserted that the holdings of the Arizona Court of Appeals in Memorandum Decision of February 27, 2003 and Arizona Supreme Court on August 8, 2003, in Denying the Davidsons' Petition for Review, caused irreparable injury to the Davidsons. Davidsons asked that the State court proceeding be preliminarily stayed and that the interlocutory award of costs and attorney's fees awarded by the Arizona Court of Appeals and Supreme court be stayed pending final adjudication of the Federal court proceeding. On November 24, 2003, the district court dismissed the case pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), denied all other pending matters, and ordered that **there be no further filings in the federal case.** On December 1, 2003, the Davidsons timely-filed Notice of Appeal.

Davidsons filed Plaintiffs' Original Complaint & Application for Injunctive Relief against Defendant Michael J. Meehan and Defendant Quarles & Brady Streich Lang on November 20, 2003, under 28 U.S.C. Section 1331 and 28 U.S.C. Section 1367 for Breach of Fiduciary Duty, Professional Negligence, and Legal Malpractice. MJM and QBSL filed Motion to Dismiss on December 22, 2003. Davidsons responded by filing Objection to Motion to Dismiss on January 13, 2004. MJM and QBSL responded by filing Reply to Objection to Motion to Dismiss on January 27, 2004. U.S. District Court Trial Judge Frank R. Zapata, the same trial judge who had previously dismissed the Davidsons' federal cause of action (*Davidson et al v. Vivra Inc, et al*) under the Younger abstention doctrine, ordered and adjudged on February 2, 2004, that the Motion to Dismiss is Granted in Davidsons' federal cause of action *(Davidson et al v. Meehan et al)*, again citing the *Younger* abstention doctrine. Davidsons timely-filed Notice of Appeal on February 10, 2004.

Davidsons assert that *"the Federal Case (Davidson, et al v. Vivra Inc, et al) is based upon the 'same nucleus of operative facts' as the State Case"*. Davidsons sought to add additional RICO counterclaims in the state court proceeding after the Trial Judge's dismissal with prejudice (under *Younger* doctrine) of the federal court proceedings, because these additional counterclaims *"arose out of the conduct, transaction, or occurrence set forth or attempted*

to be set forth in the original pleading." Davidsons' counterclaims of assault and battery in the State court proceeding represent two of the Hobbs Act violations alleged in the federal court proceeding. Davidsons have alleged that these Hobbs Act violations comprise part of the *pattern of racketeering activity* in the federal court proceeding.

Unsigned Minute Entry Orders are not appealable under Arizona law. The State court's denial of Davidsons' motion to amend their answer to add counterclaims and parties and defendants' motion to enlarge the time to comply with rule 26.1 and to extend the discovery deadline, represents a total denial of a state forum in which to *"pursue the issues presented"* and *"raise constitutional challenges"* and directly refutes Trial Judge Frank R. Zapata's underlying assumption, that the State court proceeding provides Davidsons with an adequate state forum in which to pursue the issues presented.

Neither the Arizona court of Appeals, nor the Arizona Supreme Court reached the federal Constitutional issues concerning Arizona Rule 5.1 raised by Davidsons on interlocutory appeal. See Appendix I and J to this Petition. With the filing of the Minute Entry Order of April 29, 2004, Davidsons have now been denied a legal remedy in the state trial court for federal Constitutional injuries under color of Arizona Rule 5.1 *and the Prescription Drug User Fee Act*, in both the Federal court proceedings and in the State court proceeding. *See Appendix H to this Petition.* Short of starting over, and filing a new, standalone complaint in the state trial court, which would be highly inefficient, Davidsons now have no forum whatsoever, either state or federal, in which to timely raise their federal Constitutional concerns. *Res judicata*, collateral estoppel, and statutes of limitations, are now very relevant considerations, since there are presently final judgments in the state trial court, federal district court, and U.S. Court of Appeals. By inappropriately dismissing Davidsons' federal court proceedings under the *Younger* abstention doctrine, the Trial Judge (Frank R. Zapata) has wrought irreparable harm (constitutional deprivation and actual damages) to the Davidsons. *See Appendix F and G.*

ARGUMENT IN SUPPORT OF WRIT

There was no *timely* remedy available to the Petitioners [the Davidsons], either state or federal, for federal constitutional deprivation sustained under color of Arizona Rule 5.1 and the Prescription Drug User Fee Act. Davidsons have sustained irreparable injury (*actual damages*) by reason of the willful misconduct of the federal court defendants, *acting in concert*. The "*extraordinary circumstances*" exception to *Younger* abstention applies. See Appendix C and D to this Petition.

The federal question as to whether the Prescription Drug User Fee Act ("PDFUA") is constitutionally invalid *as applied* is of imperative public importance. The PDUFA has ongoing, direct, and substantial affect upon public health, safety, and interstate commerce. *Application of the PDUFA to Davidsons, by concerted action of the Federal Actors, was motivated by invidiously discriminatory animus.* See Davidsons' Petition for Writ of Certiorari before Judgment (U.S. Supreme Court Case 04-537, cert. denied) filed on September 17, 2004.

Arizona *regularly* enforces a facially unconstitutional statute (Arizona Rule 5.1). *Application of Arizona Rule 5.1 to Davidsons, by concerted action of the State Actors, was motivated by invidiously discriminatory animus.* The *Younger* doctrine allows intervention where the challenged statute is *flagrantly and patently* violative of express constitutional prohibitions.

Davidsons' federal cause of action sounds, *in substantial measure*, on federal constitutional deprivations under 42 USC Section 1983, Section 1985, and Section 1988, the "*expressly authorized*" exception to the anti-injunction act. The final judgments of the U.S. District Court dismissing the Davidsons' federal causes of action [in both federal court proceedings CV-03-00110-FRZ and CV-03-00580-FRZ] under *Younger* doctrine were *clearly erroneous*.

I. Davidsons' request for compensatory damages should have precluded dismissal under Younger doctrine

Davidsons requested compensatory and punitive damages in their Original Complaint to the U.S. District Court against MJM and QBSL. Davidsons also requested compensatory and punitive damages in their Original and First Amended Complaint to the U.S. District Court against Vivra Inc, et al. In both federal court

proceedings, Davidsons' request for compensatory damages precludes dismissal under the *Younger* doctrine for the reasons found in *Gilbertson v. Albright*, 381 F.3d 965. (*"The principle that Younger abstention precludes, but does not delay, federal litigation applies when discretionary relief is at issue, but not when damages are; when damages are at issue, and comity dictates, courts should defer, rather than dismiss."*) Davidsons claim *actual damages* under 18 USC Section 1964 (a) and (c). Davidsons claim *actual damages* under 42 USC Section 1983, Section 1985, and Section 1988. Davidsons' claim for damages distinguishes their cause of action from that found in *Canatella v. California*, 404 F.3d 1106. See Appendix C and D to this Petition.

II. Dismissal was inappropriate because Davidsons' allegations stated a constitutional claim against their privately-retained attorney and his law firm

Davidsons have stated a claim for federal constitutional deprivation under color of law by MJM, QBSL, the Trial Judge, and the Grossmans, acting in concert, in the state court proceeding, under 42 USC Section 1983, 1985, and 1988. Three situations, in which the act of an ostensibly private person or entity can be regarded as an act under color of state law, have been described by courts as those in which (1) the actor in its conduct exercises powers and performs functions which are normally executed by the state; (2) the actor in its conduct is coerced or significantly encouraged by the state, such that the actor can be deemed a representative of the state; and (3) a sufficiently close nexus exists between the challenged action and the state to prove that the action should be regarded as that of the state. *See 15 Am. Jur. 2d Civil Rights Section 72.*

The State of Arizona, by its enactment and regular enforcement of Rule 5.1, Ariz. R. Civ. P., has "*intertwined itself* in the very activity [attorney withdrawal] which caused the Davidsons' injury." The Trial Judge Ordered the grant of attorney withdrawal under color of Arizona Rule 5.1. MJM's and QBSL's Motion to Withdraw cited Rule 5.1 as authority for their motion. There is an extremely close nexus between the state [the Arizona Trial Court system] and the challenged action of the regulated entity [MJM and QBSL]. The action of the latter may be fairly treated as that of the state itself. The State has insinuated itself

into a position of interdependence with MJM and QBSL so that it is a joint participant in the enterprise.

The Davidsons' due process rights were violated because the statutory scheme [rule 5.1] ***afforded no hearing at all***. The attorney withdrawal was ordered by the Court after motion by MJM and QBSL [officers of the court], exercising their discretion in a way encouraged by state law, under color of Rule 5.1. The attorney withdrawal was ordered by the Court, after motion by MJM and QBSL [officers of the court] citing authority under rule 5.1 and nonobjection by opposing legal counsel [Karp, Heurlin & Weiss]. Opposing counsel actually drafted the Trial Judge's Order. The Order of the Trial Judge bears the letterhead of opposing counsel. The Davidsons were the real parties in interest to attorney withdrawal, not the Grossmans. Both QBSL and MJM and opposing legal counsel ***already knew*** that the Trial Judge would Order Attorney Withdrawal. Both QBSL/MJM and opposing legal counsel were so confident of this assertion that opposing counsel actually drafted the Trial Judge's Order, effectively making QBSL, opposing counsel, and the Trial Judge, state actors, all acting pursuant to Rule 5.1. QBSL's and MJM's Motion to Withdraw was very much a self-fulfilling [pre-ordained] prophecy, culminated by the Trial Judge's signature on the previously written Order [by opposing counsel] and encouraged and enabled by Rule 5.1, Ariz. R. Civ. P.

There is a causal link between the Davidsons' injury and the State's Action sufficient to support standing under Article III. The State has exercised "*coercive power*" or provided such significant encouragement that "*the choice must in law be deemed to be that of the State.*" The State disenfranchised the Davidsons from their [retained] legal representation without affording appropriate procedural protections.

There is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself. Under the joint participant theory, governmental body [the Arizona Trial Court system] and private party [MJM and QBSL] were intertwined in symbiotic relationship. Relevant facts show pervasive entwinement between government [Arizona Trial Court system] and ostensibly private

organization [MJM and QBSL] to point of largely overlapping identity.

State participation in a nominally private activity can result in a characterization of that activity as "*state action*" for purposes of 42 USC Section 1983. Private actors may align themselves so closely with either state action or state actors that the undertow pulls them inexorably into the grasp of Section 1983. There is liability of private parties who conspire with immune officials in federal civil rights action under 42 USC Section 1983. See *44 A.L.R. Fed. 547.*

In *Pugliano v. Staziak*, 231 F.Supp. 347, the court stated that, "*unless the attorney wronged the [criminal] defendant in furtherance of a conspiracy participated in by persons acting under color of state law, the court declared, it would not have jurisdiction of any suit against him.*" MJM and QBSL were not just private individuals for the purposes of 42 USC Section 1983. They conspired with each other, the Trial Judge, and the Grossmans, to deprive the Davidsons of the presently-enjoyed benefit of their retained legal counsel, just 4 months before the scheduled trial date, under color of Arizona Rule 5.1.

"*There are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take.*" See *Briley v. State of Cal.*, 564 F.2d 849. If we were to say that jurisdiction existed in order to deprive the Davidsons [or any other Arizona citizens] of their retained legal counsel without adherence to the requirements of due process and equal protection mandated by the Fourteenth Amendment of the U.S. Constitution, we would be sanctioning judicial tyranny from the bench.

Davidsons' federal action states a substantial claim under 42 USC Section 1983, 1985, and 1988, because it seeks to redress a deprivation of federal statutory rights secured by the Constitution and laws of the United States.

Davidsons' claim of "*extraordinary circumstances*" is not rooted only in the claimed Constitutional violation. The Davidsons have sustained ***actual damages*** and ***irreparable harm***. See Appendix C and D to this Petition. The Constitutional dimension of the error claimed does not, by itself, constitute an exception to the application of *Younger* abstention. ***The deprivation***

occurred as the result of some established state procedure under Arizona Rule 5.1. There was State Action. MJM, QBSL, Trial Judge, and Grossmans, were all State Actors, who conspired to deprive the Davidsons of their presently-enjoyed liberty and property interest in retained legal counsel in the state court proceeding. ***Davidsons' property and liberty interest in their retained legal counsel was not accorded a "legal guarantee of present enjoyment" under State law***.

Davidsons have suffered deprivation of property interest without due process of law. ***Davidsons assert invidious discrimination purpose when Arizona Rule 5.1 was enacted***. Davidsons have alleged that MJM and QBSL caused willful injury to their clients (the Davidsons) and acted out of malice and bad motive. Actionable deprivations must be based on "*misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of state law.*" A taking with intent (or reckless disregard) of a claimant's property by a State agent violates Due Process clause of Fourteenth Amendment and is ***actionable under 42 USC Section 1983***.

In *Briley v. State of Cal.*, the plaintiffs did not assert the state involvement necessary to transform the private acts of the hospital and doctors into state action covered by Section 1983. In the case at bar, however, however, the Davidsons did assert the state involvement necessary to transform the private acts of MJM, QBSL, the Trial Judge, and the Grossmans, into state action covered by Section 1983.

In *Minns v. Paul*, 542 F.2d 899, the court pointed out that no facts were alleged in the instant case to indicate that the court-appointed attorney had exceeded the scope of his function or that he had intentionally "*disregarded*" the state prisoner's rights. In the Davidsons' case at bar, however, the Davidsons have alleged facts to indicate that MJM and QBSL, exceeded the scope of their function and intentionally "*disregarded*" the Davidsons' rights.

Davidsons have alleged facts to indicate that MJM and QBSL maliciously abandoned their clients, defrauded the trial court so as to be relieved of their professional and legal responsibility to the Davidsons after "draining" them of over two years of attorney's fees and costs, and falsely

attributed their motion to withdraw as counsel of record to ethical considerations, when in fact their actual motive was to conceal their prior knowledge of the substance and content of the Prosecution Memorandum. The motion to withdraw was intended to permanently deprive the Davidsons of a legal remedy for the injuries wrought upon them by the Grossmans and others, acting in concert, and permanently deprive the Davidsons of their substantial financial investment in their retained legal counsel (over two years of attorney's fees and costs).

The malicious abandonment took place just 4 months before the scheduled trial date. At no time during or prior to the "*gap interval*", the interval between the Motion to Withdraw and the Order granting withdrawal, did the Davidsons have a duty to retain new legal counsel or, in the alternative, to appear pro se in the state court proceeding. The Davidsons did not terminate the attorney-client contractual relationship with MJM and QBSL, either expressly or by their conduct.

Davidsons have alleged that MJM's and QBSL's conduct was intentionally harmful to the Davidsons, or otherwise deliberately inconsistent with their obligations to the Davidsons, so as to be a voluntary excursion outside the scope of their duties. Liability may attach to MJM, QBSL, the trial judge, and the Grossmans, under 42 USC Section 1983, 1985, and 1988, when the acts complained of are done outside the scope of their duty. The Davidsons have established actual damages as part of their claim.

The Ninth Circuit broadly construes the scope of judicial immunity from liability. The Ninth Circuit holdings in the cases cited in *Briley v. State of Cal.* are not dispositive here and they are inapplicable to case at bar. A lawyer and law firm who maliciously abandon and slander their clients, under color of law, acting in concert with the trial judge and opposing legal counsel, should be an exception to the doctrine of judicial immunity. ***Liability attaches to MJM, QBSL, the Trial Judge, and Grossmans, under 42 USC Section 1983, 1985, and 1988, because the acts complained of were done outside the scope of their duty***. *See Carruth v. Geddes, 443 F. Supp. 1295.*

"A lawyer engaged in strategic conduct forfeits any right to withdraw." "One form of strategic behavior is waiting until the client is over a barrel and then springing a demand for payment." MJM and QBSL agreed to strategic conduct against their then clients prior to filing their Motion to Withdraw. See *Fidelity Natl. Title Co. v. Intercounty Natl. Title Co.*, 310 F.3d 537. In *Fidelity National Title Insurance Co, v. Intercounty Title*, the Court of Appeals held that denial of attorney's motion to withdraw was ***immediately appealable as collateral order, and court's order denying attorney's motion to withdraw was abuse of discretion***. As a matter of professional ethics, decision to appeal an order disqualifying counsel should turn entirely on client's interest. Similarly, a decision to appeal an order granting withdrawal of counsel should turn entirely on client's interest. No conclusive presumption as to "*good cause*" should be afforded the withdrawing counsel. Notice and a hearing are required to satisfy the Fourteenth Amendment procedural due process rights of the client.

Some kind of hearing is required at some time before the State finally deprives a person of his property or liberty interest. See *Parratt v. Taylor*, 101 S.Ct. 1908. 42 USC Section 1983 affords a "*civil remedy*" for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind. The Prosecution Memorandum provides prima facie evidence that the Grossmans' filing of the State court proceeding and MJM's and QBSL's filing of the Motion to Withdraw as counsel of record in the State court proceeding, were both motivated by bad faith (*evil intent*). See Motion for Judicial Notice of Prosecution Memorandum, on June 11, 2004, in Ninth Circuit Case 04-15304.

For the purposes of 42 USC Section 1983, an attorney does not act under color of state law "*when performing a lawyer's traditional functions*" as counsel to defendant in a [criminal] proceeding. *See 36 A.L.R. Fed. 594*, at page 18. ***MJM and QBSL were not performing a lawyer's "traditional function" when they filed their motion to withdraw under Arizona Rule 5.1, which was intended to maliciously abandon and slander the Davidsons***. ***MJM's and QBSL's Motion to Withdraw as counsel of record for the Davidsons was not in any way an***

act "on behalf of the clients [Davidsons] in the historical and traditional manner". MJM and QBSL clothed their Motion to Withdraw with the authority of State law (Arizona Rule 5.1), and *the trial judge and opposing legal counsel for Grossmans, agreed that MJM and QBSL should be granted withdrawal.*

In *Whiting v. Lacara*, 187 F.3d 317, the collateral order doctrine permits appeal from an order denying leave to withdraw as counsel. In the case at bar, however, the same reasoning under the collateral order doctrine permits appeal from an order granting leave to withdraw as counsel. An order granting withdrawal *"affects the clients forced to proceed without the presently-enjoyed benefit of their retained legal counsel in a civil proceeding."* The injury to the clients [the Davidsons] is irreparable. Now that a *"final"* judgment has been entered by the Trial Judge in the state court proceeding, the harm to clients [the Davidsons] is complete, and it is doubtful that relief can be obtained on appeal. A litigant's right to retain an attorney of choice can be protected on review of final judgment if appellate courts are willing when necessary to set aside verdicts, even when they result from lengthy civil proceedings. See *Richardson-Merrell Inc v. Koller*, 105 S.Ct. 2757 at pages 15-16.

Davidsons detrimentally relied upon the intentional misrepresentation found in a letter of January 15, 2001, from MJM to the Davidsons, which states, *"I do not expect this [his change in law firm] to affect or impair in any way my ability to continue effective representation for you."* MJM and QBSL maliciously breached their contractual and fiduciary relationship with the Davidsons in their Motion to Withdraw. In their Motion to Withdraw, MJM and QBSL maliciously abandoned and slandered the Davidsons and defrauded the Trial Court.

If it can be shown on appeal of a final judgment on the merits of a case that a party was prejudiced by the denial of a disqualification motion, there would be a remedy in a reversal and a new trial. Similarly, the Davidsons argue that if it can be shown on the appeal of a final judgment on the merits of a case that *a party was prejudiced by the granting of an attorney withdrawal motion*, there would be a *remedy in a reversal and a new trial*. However, the *"final"* Judgment in the case at bar never reached

the merits of Davidsons' case, much less reaching their Constitutional concerns.

Default Judgment ordered in favor of the Grossmans for $7,849,031.27 (plus interest at 10% per annum) firmly establishes that the Order of January 11, 2002, granting attorney withdrawal prejudiced the Davidsons' cause of action. This default judgment also struck the Davidsons' counterclaims in the state court proceeding, *without ever reaching the merits of the case and without ever reaching the Davidsons' federal Constitutional concerns*.

MJM and QBSL are not entitled to judicial immunity because they were not acting within the scope of their duties as the Davidsons' retained legal counsel when they moved to withdraw as the Davidsons' defense attorney. The Motion to Withdraw represents malicious abandonment and slander of their clients (the Davidsons), breach of contract, breach of fiduciary duty, and fraud upon the court.

III. Davidsons were precluded from raising federal law claims in the state forum

The Minute Entry Order of April 29, 2004, makes a mockery of Arizona Rules 13, 15, and 19, whose purpose is to encourage permitting pleadings to be amended so as to facilitate the efficient and effective resolution of an entire controversy. While a request for leave to amend is one addressed to the discretion of the trial court, *the policy of the Rule favors the liberal allowance of requests to amend*. Arizona Rule 13 permits the addition of counterclaims which either matured or were acquired by the pleader after serving a pleading. The purpose of Arizona Rule 19 is to insure the joinder of all interested parties in a single action and avoid a multiplicity of litigation.

Minute Entry Order of April 29, 2004, made it impossible for the Davidsons to *fairly* pursue their Constitutional claims in the ongoing state proceeding, and conclusively and with finality determined the respective rights of the parties to the State court proceeding. *The Minute Entry of April 29, 2004, is tantamount to denying the Davidsons the right to argue and prove pattern of misconduct and conspiracy in the State court proceeding.*

The State trial judge caused irreparable injury to the Davidsons in the Minute Entries of April 29, 2004, and

November 9, 2004. These Minute Entries, along with the Order of January 11, 2002 (which ordered the withdrawal of the Davidsons' retained counsel of record under Arizona Rule 5.1), effectively dictated the outcome of the state court proceeding.These three rulings, conclusively and with finality determined the respective rights of the parties to the State court proceeding.

In the entire state court proceeding, there are no rulings by this trial judge which favored the Davidsons. Bias of this trial judge against the Davidsons, specifically, and against RICO actions, in general, is firmly established by these three state court rulings, which clearly favored the Grossmans and the federal court defendants in the Davidsons' federal cause of action. This trial judge made no effort whatsoever at impartiality. These rulings employed artful use of the phrases *"for the purposes of harassment and delay"* and *"frivolous motions"* [phrases borrowed directly from the Grossmans' legal counsel] so as justify denial of the Davidsons' Motion to Amend Defendants' Answer, to Add Counterclaims, and Add Parties.

This Court should recognize the significance of the Minute Entry of April 29, 2004. *This ruling was intended to prevent any of Grossmans' co-conspirators in the federal court proceeding from being impleaded as parties in the State court proceeding. This ruling was intended to prevent the Davidsons from ever raising their concerns regarding the federal Constitutionality of the PDUFA before an Arizona court. The Arizona trial court has proven itself to be an incompetent forum in which to raise the Davidsons' concerns regarding the federal Constitutionality of the PDUFA.*

The Minute Entry Order of April 29, 2004, denying the Davidsons' Motion to Amend Defendants' Answer, to add Counterclaims, and add Parties, ***greatly prejudiced the Davidsons***, by denying Davidsons the right to argue and prove pattern of misconduct and conspiracy in the State court proceeding. This ruling effectively sounded a *"death knell"* over the proceeding. The trial judge might just as well have entered default at the same time. Instead, she waited until Davidsons filed an Emergency Motion to Stay the Proceedings. She then entered default (and sanctions) against Davidsons, and struck the

counterclaims, in her Minute Entry Order of November 9, 2004. Arguably, the trial judge should have recused herself after the Minute Entry Order of January 11, 2002. The appearance of impropriety from the case record is undeniable. The Amended Judgment (nunc pro tunc) and Second Amended Judgment (nunc pro tunc) have an even greater appearance of impropriety.

Davidsons' Motion to Amend Defendants' Answer, to add Counterclaims, and add Parties, was timely-filed, in good faith reliance upon the Minute Entry Order of January 23, 2004. This Court is referred to the Minute Entry of January 23, 2004, in the State court proceeding for clear evidence of a *"bait and switch"* by the State court trial judge. The Davidsons were advised by the State court per Telephonic Status Conference and Minute Entry of January 23, 2004, that they may move to add additional claims under Rule 15 (a), and additional parties under Rule 19 (a), because of *recent developments in the United States District court.* The Davidsons detrimentally relied upon the state trial judge's statement on January 23, 2004, *"It is ordered that the defendant shall file any motions to amend the defendant's answer, to add a counter-claim, or to add parties, on or before Friday, February 27, 2004."* See the Davidsons' Amended Answer to First Amended Complaint and Counterclaims, and Motion to Amend Defendants' Answer, to add Counterclaims, and add Parties, both of which were timely-filed on February 27, 2004, in the State court proceeding. See Appellees' SER in Ninth Circuit Case 03-17342, Tab 20, at pages 448-485.

The interlocutory award of attorney's fees and costs to the Grossmans on May 26, 2004, (under Mandate of the Arizona Court of Appeals), caused further *irreparable injury* to Davidsons' business and property in the State court proceeding.

Davidsons had no dilatory motive or bad faith when they moved the Trial Court to amend their answer and counterclaim to add both parties and claims. It is inexplicable why the Trial Judge denied the Davidsons' Motion to Amend. This denial represents a complete denial of a State forum in which to raise the Davidsons' federal Constitutional concern as to the PDUFA. The State court's ruling of April 29, 2004, is why the PDUFA is not presently at bar in the State court proceeding. The PDUFA was very much a part of the Davidsons' Amended Answer to First Amended Complain and Counterclaims. Because of the Minute Entry Order of April

29, 2004, the PDUFA will never be raised in any state court proceeding against any of the defendants in the Federal court proceeding. Thus, the Davidsons *and other victims* have been permanently denied a remedy in the Arizona State court system for federal Constitutional injury under color of the PDUFA, by any of the defendants in the Federal court proceeding.

Davidsons sought to add additional RICO counterclaims in the state court proceeding after the Trial Judge's dismissal with prejudice (under *Younger* doctrine) of the federal court proceedings, because these additional counterclaims *"arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."* Davidsons' counterclaims of assault and battery in the workplace by Jay Grossman upon Robert Davidson on May 11, 1999, in the State court proceeding, represent two of the Hobbs Act (18 USC Section 1951) violations alleged in the Federal court proceeding. Davidsons alleged that these Hobbs Act violations comprise part of the *pattern of racketeering activity* in both the federal and state court proceedings.

Davidsons' Motion to Amend Defendants' Answer, to add Counterclaims, and add Parties, timely-filed on February 27, 2004, in the State court proceeding, was not *"filed for the purpose of delay and harassment"*. Granting the motion would not prejudice the Grossmans, because the Grossmans were codefendants in the Federal court proceeding, and Davidsons' Amended Answer to First Amended Complaint and Counterclaims, *added substantially fewer counterclaims and impleaded substantially fewer parties than were previously present in the Federal court proceeding.* Davidsons' Amended Answer to First Amended Complaint and Counterclaims sought to include *only* parties and claims that were already parties and claims in the Federal court proceeding. Two of the new parties (Charles W. Ott and Vivra Holdings Inc) readily signed waiver of service of summons in the State court proceeding.

Without the predicate act violations, in a pattern of racketeering activity, and overt acts of conspiracy found in the FDA Tucson, AZ, EIR of 5/5-6/28/99, a substantially delayed and heavily redacted copy of which was finally obtained by the Davidsons on or about February 20, 2001, by means of an FOI request, the Davidsons did not know that a conspiracy existed.

Page 13, Paragraph 11, of this report documents an agreement between Gayle F. Petrillo (the Vivra Tucson Practice Manager) and Jay Grossman to obstruct justice, overt acts of conspiracy to obstruct justice, and conspiracy to obstruct justice. This document provides the *mens rea* for criminal obstruction of justice at Page 13, Paragraph 11. Gayle F. Petrillo was the third new party sought to be impleaded.

The Trial Judge's Minute Entry Order of April 29, 2004, denying the Davidsons' Motion to Amend Defendants' Answer, to add Counterclaims, and add Parties, ***greatly prejudiced the Davidsons***, by denying Davidsons the right to argue and prove pattern of misconduct and conspiracy in the State court proceeding. *This ruling was intended to prevent the Davidsons from ever raising their concerns regarding the federal Constitutionality of the PDUFA before an Arizona court.* ***The Arizona trial court has proven itself to be an incompetent forum in which to raise the Davidsons' concerns regarding the federal Constitutionality of the PDUFA***.

Davidsons were barred from raising federal claims in the State court proceeding. See *Lebbos v. Judges of Superior Court*, 883 F.2d 810 (1989). Davidsons affirm that in the State court proceeding, Arizona Court of Appeals [2CA-CV-2002-0051], and Arizona Supreme Court [CV-03-0138-PR], they did not have an opportunity to raise their federal claim because they were procedurally barred from raising such claims. *Dubinka v. Judges of Superior Court*, 23 F.3d 218 (1994). *Younger* abstention is not appropriate when state law imposes procedural barriers to raising the constitutional claims in state court proceedings. The third Middlesex prong is lacking in both federal district court proceedings.

Davidsons have been forced to represent themselves pro se in the State court proceeding, before a biased trial judge, with an irrevocably-prejudiced case, without the previously-enjoyed benefit of retained legal counsel, *based solely upon a conclusive presumption of the trial judge*.

The Minute Entry of April 29, 2004, is material to the question of bias of the trial judge and competency of the state court proceeding. The Memorandum Decision of the Arizona Court of Appeals on February 27, 2003, and the Arizona Supreme Court's

denial of Davidsons' Petition for Review on August 8, 2003, also go directly to the competency of the state court proceeding and institutional bias of the Arizona court system. The due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. See Appendix H, I, and J.

When the trial judge dismissed the federal court proceedings [CV-03-00110-FRZ- and CV-03-00580-FRZ] under the abstention doctrine of *Younger v Harris*, he stated that Davidsons have an adequate opportunity to litigate any alleged federal claims *in the ongoing state court proceeding*. *This is clearly not true*, particularly in light of the State court Minute Entry of April 29, 2004. This Minute Entry, makes it impossible for Davidsons to *fairly* pursue their constitutional claims in the ongoing state proceeding. Since Arizona court rules did not permit raising the Rule 5.1 constitutional claim in the state court proceedings, *Younger* abstention principles were not applicable to the federal court action seeking to enjoin enforcement of the unconstitutional statute.

IV. Withdrawal of counsel in the State Action deprived Davidsons of federal constitutional rights

Withdrawal of counsel in the State Action deprived Davidsons of federal constitutional right to due process, equal protection, right to contract, and right to freedom from arbitrary takings, secured by the Fifth, Sixth, and Fourteenth Amendments, and Article I, Section 10 (1). Davidsons were denied federal constitutional rights by State Action under color of Arizona Rule 5.1 in the State court proceeding. Davidsons were denied their right to due process and equal protection under the 14th Amendment, right to contract, and right to freedom from arbitrary takings, under color of Arizona Rule 5.1, and there was State Action by State Actors, acting in concert.

Davidsons have suffered deprivation of property interest without due process of law. ***Davidsons assert invidious discrimination purpose when Arizona Rule 5.1 was enacted***. Davidsons have alleged that MJM and QBSL caused willful injury to their clients (the Davidsons) and acted willfully, out of malice, and with bad motive. Actionable deprivations must be based on "*misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority*

of state law." A taking with intent (or reckless disregard) of a claimant's property by a State agent violates Due Process clause of Fourteenth Amendment and is ***actionable under 42 USC Section 1983***.

The Trial Judge's Order suddenly and arbitrarily deprived Davidsons of their legal representation, less than four months before the scheduled trial date. The trial court's Order suddenly and arbitrarily deprived Davidsons of their considerable financial investment in their retained legal representation (almost three years of legal fees). The trial court's Order suddenly and arbitrarily deprived Davidsons of freedom from having to find alternate legal representation, on very short notice, without access to the case file, or else have to represent themselves, pro se. In one swift stroke, the trial court absolved MJM and QBSL from their contractual and professional responsibility to their clients (the Davidsons), irreparably prejudiced Davidsons' case, and denied Davidsons their presently-enjoyed expectancy interest in liberty, property, and equal protection under law, in violation of the Fourteenth Amendment of the U.S. Constitution.

There was not *"good cause appearing therefore"*, upon which to base the State court's Order of January 11, 2002, which Ordered that attorney withdrawal is granted. By the totality of the circumstances, information and belief, MJM and QBSL conspired with the Trial Judge and opposing legal counsel, as State Actors, to deprive Davidsons of their presently-enjoyed, property interest in retained legal counsel in an ongoing civil proceeding, under color of Arizona Rule 5.1.

V. The *"extraordinary circumstances"* exception to *Younger* abstention applies

"Extraordinary circumstances" exception to *Younger* abstention has been found where parties were deprived of an adequate opportunity to raise and have timely decided federal issues in state court proceedings. See *Martin-Marietta Corp. v Bendix Corp*, 690 F.2d 558. *"Extraordinary circumstances"* exception to *Younger* abstention has been found where parties were deprived of a full and fair opportunity to litigate their constitutional objections. See *Thomas v Fiedler*, 700 F. Supp. 1527. Arizona Rule 5.1 is *"blatantly and flagrantly"* violative of express Constitutional protections. Withdrawal of Davidsons'

counsel in the State Action deprived Davidsons of federal constitutional rights. Minute Entry Order of April 29, 2004, deprived Davidsons of an adequate opportunity to raise and have timely decided federal issues as to the PDUFA in state court proceedings. Minute Entry Order of April 29, 2004, deprived Davidsons of a full and fair opportunity to litigate their constitutional objections as to the PDUFA.

The state court proceeding should have been stayed by Davidsons' Emergency Motion to Stay the Proceedings, submitted on September 21, 2004. Minute Entry Order of November 9, 2004, in the State court proceeding, not only denied Davidsons' motion for stay, but also actually entered default (and sanctions), and struck Davidsons' counterclaims, ***all without ever reaching Davidsons' federal Constitutional concerns or the merits of the State case***.

Davidsons have alleged actual damages and extraordinary circumstances, wherein the withdrawal of their retained counsel in the State Action, deprived Davidsons of federal Constitutional rights. Davidsons have alleged more than the Constitutional dimension of the clear error claimed in the State court proceeding.

"*Extraordinary circumstances*" in the federal court proceedings to permit federal intervention, include a [prosecution] undertaken in **bad faith** (see Prosecution Memorandum), a [prosecution] under a **flagrantly unconstitutional statute** (Arizona Rule 5.1), and **irreparable injury** (actual damages). MJM's and QBSL's motion to withdraw as counsel of record (December 17, 2001), when viewed against the backdrop of the Prosecution Memorandum (November 20, 2000) provides prima facie evidence of actual malice and willful misconduct by the attorney (MJM) and his law firm (QBSL) towards his clients (Davidsons). Exceptions for bad faith, harassment, and extraordinary circumstances, allow a federal court to decline to apply *Younger* abstention *even if all requirements for such abstention are met in a particular case*. Davidsons, however, provided persuasive arguments, in their briefs and motions to the Ninth Circuit U.S. Court of Appeals, that *not all of the requirements for abstention were met* in the federal court proceedings.

VI. Rule 5.1 of the Arizona Rules of Civil Procedure is unconstitutional on its face or as applied to the Davidsons

Withdrawal of counsel in the State Action deprived Davidsons of federal constitutional right to due process, equal protection, right to contract, and right to freedom from arbitrary takings, secured by the Fifth, Sixth, and Fourteenth Amendments, and Article I, Section 10 (1).

Davidsons were denied federal constitutional rights by State Action under color of Arizona Rule 5.1 in the State court proceeding. A series of recent 9th Circuit appellate cases, which base their holdings upon *U.S. v. Sardone*, 94 F.3d 1233 (1996) citing *Hedges v. Resolution Trust Corp.*, 32 F.3d 1360 (1994), hold that *"there is generally no constitutional right to counsel in civil cases."* There is currently a long-standing *split of authority* between the U.S. Circuit Courts of Appeals on the question of *the right to legal counsel in a civil lawsuit*. This split of authority amongst the U.S. Circuit Courts of Appeals urges this Court to review two final judgments of the U.S. District Court, District of Arizona, in the closely related federal cases CV-03-00110-FRZ and CV-03-00580-FRZ. These judgments involve identical or closely related questions, which draw into question the Constitutionality of Arizona Rule 5.1. The risk of an erroneous deprivation by the State action in the state court proceeding is substantial.

The Trial Judge in the federal court proceeding [CV-03-00580-FRZ] erred when he cites *U.S. v. Sardone,* as authority for his view that *"there is generally no constitutional right to counsel in civil cases."* He fails to distinguish between the right to appointed counsel and the right to retained counsel. The federal constitutional right to retained legal counsel in an ongoing civil proceeding was not a prospective property interest. It was a presently-enjoyed property interest once Davidsons entered into a retainer agreement with Michael J. Meehan (Respondent).

Davidsons were deprived of the presently-enjoyed benefit of retained counsel in an ongoing civil proceeding without procedural due process. The process that was due is, at minimum, a hearing. There was no such hearing afforded Davidsons. The opposing legal counsel (MJM, QBSL, and Bruce Heurlin) simply *agreed between themselves and with the Court* under color of Arizona Rule 5.1, and there was State Action. To say that there is

generally no constitutional right to retained counsel in civil cases is a statement of such broad scope and sweep that it would undermine many, if not all, of the basic foundations upon which our legal system rests. The right to retained legal counsel is a basic personal right which requires that courts exercise special solicitude under the heightened (strict) scrutiny standard of review.

Davidsons' complaint against MJM and QBSL is based on *whether the State has power to disenfranchise litigants from presently-enjoyed benefit of retained legal representation in an ongoing civil proceeding, without due process and equal protection guaranteed under the Fourteenth Amendment.* Davidsons' property interest in their retained legal representation was a presently-enjoyed property interest at the time of the Trial Judge's Order granting attorney withdrawal. Davidsons have a legitimate claim to entitlement to their retained legal representation in a civil proceeding. There was nothing permissive about the Trial Judge's Order. The Order was arbitrary and capricious. There was no hearing or certification process afforded to the Davidsons.

Davidsons did not voluntarily elect to proceed pro se. They were forced by State Action to proceed pro se. Davidsons did not voluntarily elect to be deprived of their retained counsel of record. Granting an attorney the right to withdraw without the clients' consent interferes with civil litigants' Constitutional rights. The right to enjoy property without unlawful deprivation is a personal right. There is no real dichotomy between personal liberties and property rights. The right to the presently-enjoyed benefit of retained legal representation in an ongoing civil proceeding is a basic civil right. Arizona Rule 5.1 places a meaningful burden on a fundamental personal right. ***Davidsons' challenge to the federal Constitutionality of Arizona Rule 5.1 rests on procedural and substantive due process grounds, equal protection grounds, takings clause grounds, and right to contract grounds. The strict (heightened) scrutiny standard of review should apply***.

The issue before this Court is not whether the Davidsons had the *opportunity* to retain new legal counsel after the Trial Judge's Order of January 11, 2002. The issue before this Court is whether:

(a) QBSL's and MJM's Motion to Withdraw (***after the action had been set for trial***), (b) Grossmans' Nonobjection to Attorney Withdrawal, and (c) the Trial Judge's Order for Attorney Withdrawal (under Arizona Rule 5.1), provided the Davidsons with the guarantees of due process, equal protection, right to contract, and freedom from arbitrary Takings, found in the U.S. Constitution.

"There is now a relatively prevalent practice in the Arizona trial court system [under color of Rule 5.1, Ariz. R. Civ. P.], to which the Superior Courts generally do not object, of submitting stipulations for the substitution of counsel without the client's written endorsement." See page 85 of the Arizona Civil Rules Handbook, 2002 Edition, by Daniel J. McAuliffe. ***Where state courts have regularly applied an unambiguous statute, there is no need for a federal court to abstain from determining the constitutionality of the statute until state appellate courts have had an opportunity to construe it***. *City of Houston, Tex. v. Hill*, 482 U.S. 451 (1987).

MJM's and QBSL's contractual and professional duty to the Davidsons did not end with their Motion to Withdraw as counsel of record on December 18, 2001, just 4 months before the scheduled trial date. There was no communication by MJM and QBSL to the Davidsons of their intent to withdraw as counsel of record, prior to filing the Motion to Withdraw as counsel of record. MJM and QBSL were never given permission by the Davidsons to withdraw. There was no endorsement upon the Motion to Withdraw, either by signature of substituting attorney or by signature of the clients. The Davidsons never waived their right to appeal the trial judge's signed ruling on January 11, 2002, which ordered attorney withdrawal. There was no hearing afforded to the Davidsons as to the Motion to Withdraw, either pre- or post-deprivation. While the Grossmans were parties in interest to the Motion to Withdraw, the Davidsons were the real parties in interest to the Motion to Withdraw.

It is an oxymoron for the State court trial judge to base the ruling of January 11, 2002, on the fact that the Davidsons did not file an objection to the Motion to Withdraw. This ruling presumes that the Davidsons had no objection to their legal counsel's withdrawal, which is simply *not true*. The trial judge's seriously

flawed reasoning also presumes that the Davidsons suddenly acquired an obligation to retain new legal counsel, or else appear in the trial court pro se, simply because of the Motion to Withdraw. If an objective observer follows this flawed reasoning to its logical conclusion, an attorney's contractual and professional responsibility to act in their client's behalf as their retained legal counsel in any State court proceeding, can be immediately shifted from attorney to client, without the clients' written endorsement, simply by filing a Motion to Withdraw, even after the action is set for trial, under color of Arizona Rule 5.1.

After MJM changed law firms (he joined the law firm of QBSL during his representation of the Davidsons in the State court proceeding), he stated in writing in a letter of January 15, 2001, from MJM to the Davidsons, "*I do not expect this [his change in law firm] to affect or impair in any way my ability to continue effective representation for you.*" MJM and QBSL abandoned their clients (the Davidsons) with their Motion to Withdraw, just four months before the scheduled trial date, under color of Arizona Rule 5.1.

It is an oxymoron to say that the Davidsons failed to object to the Motion to Withdraw, during the interval of time ("*the gap period*") between the Motion to Withdraw and the Order granting attorney withdrawal. As their retained legal counsel in the State court proceeding, MJM and QBSL were still under contractual and professional duty to the Davidsons *during the gap period*. With their Motion to Withdraw, MJM and QBSL ceased providing the Davidsons with legal representation (effective or otherwise), under color of Arizona Rule 5.1.

Arizona Rule 5.1 is facially unconstitutional. It subrogates client's rights to those of their attorney's, based upon a conclusive presumption of the trial judge. It creates a constitutionally-impermissible unequal classification of clients and attorneys. It provides none of the citizens of the State of Arizona with constitutionally-guaranteed protections of presently-enjoyed property and liberty interests in their retained legal counsel.

Every Arizona citizen is vulnerable to the same federal constitutional deprivation, because clause (ii) of Ariz. R. Civ. P. Rule 5.1 (A)(2)(C) is written as a *disjunctive condition*, that is it reads, [in pertinent part], "..., *or (ii) unless the court is satisfied for good cause shown that the attorney should be permitted to*

withdraw." This statutory construction renders Ariz. R. Civ. P. Rule 5.1 to be *"flagrantly and patently"* violative of express Constitutional protections. There is no hearing or certification process afforded to clients to protect client's rights. There is no protection against the risk of error by the state. The consequence of error is substantial.

The enactment and statewide enforcement of Arizona Rule 5.1 represents purposeful and invidious discrimination by the Arizona court system in favor of attorney's rights over client's rights. The Arizona court system is not capable of rendering an unbiased evaluation of the federal constitutionality of Arizona Rule 5.1. The fact that the Arizona Court of Appeals dismissed the Davidsons' appeal without reaching the merits of the appeal, and the Arizona Supreme Court denied the Davidsons' Petition for Review [unpublished ruling], is entirely consistent with the Davidsons' assertion that the Arizona Court system is institutionally biased. *The Arizona Court system is either unwilling or unable to hold itself [Arizona Rule 5.1] to be unconstitutional.* The Arizona court system is not a competent state forum in which to raise the Davidsons' constitutional challenges.

There is a causal link between the Davidsons' injury and the State's action sufficient to support standing under Article III. Amongst the violations alleged in the Davidsons' Complaint against MJM and QBSL is an unconstitutional deprivation of property [and liberty, equal protection, right to contract, and right to freedom from Takings]. The State has exercised *"coercive power"* or provided such significant encouragement that *"the choice must in law be deemed to be that of the State"*. The Davidsons had a protectable, presently-enjoyed, property interest in their retained legal representation in the State court proceeding. The State actors deprived them of this property interest without procedural fairness. The State did not provide the Davidsons with either a pre-deprivation or a post-deprivation hearing. The State did not provide the Davidsons with an opportunity to sign a certification stating that they had made suitable arrangements to be prepared for trial.

Davidsons assert that their having an attorney under retainer for more than 2 years [*until 4 months before the scheduled trial date*], heightens their interest in receiving procedural safeguards

to ensure that constitutionally-protected, presently-enjoyed, rights of liberty and property are not arbitrarily terminated by State action.

Davidsons were impermissibly deprived of liberty and property without procedural fairness. They were entitled to the expectancy that their presently enjoyed liberty and property rights would not be arbitrarily terminated by the Trial Court in the State court proceeding. The Davidsons were arbitrarily and impermissibly denied an opportunity to challenge the Trial Court's Order of January 11, 2002, in violation of the procedural due process (fundamental fairness) guarantee under the Fourteenth Amendment. The Trial Court in the State court proceeding summarily absolved MJM and QBSL of their contractual and professional responsibility to their clients [the Davidsons] at the precise moment of their clients' greatest need, i.e., just before trial, under Arizona Rule 5.1.

Under the 3 prongs of the Eldridge case, the private interest in their property interest in retained counsel is weighty, the procedure devised by the State [procedure by means of a hearing or certification by client is non-existent under Rule 5.1] is fraught with risks of error, and the countervailing governmental interest [solely pecuniary] is insubstantial.

In the cases at bar, the State's aim is not simply to influence the attorney-client relationship, but to extinguish it. A termination of client's rights is both total and irrevocable. This forced dissolution of the attorney-client relationship should be recognized as a punitive sanction by courts. Termination of client rights by the State is a "*unique kind of deprivation*". The State's [Trial Judge's Order of January 11, 2002] action under color of Rule 5.1, "*completely and permanently terminated all rights and obligations*" between attorney and client.

The Trial Court conclusively presumed that certain facts existed which permitted it to categorize the Davidsons into a class (clients), and thereby subject them to burdens not visited upon others (attorneys), in violation of the due process and equal protection guarantee under the 14th Amendment. The Trial Court's ruling (Order of January 11, 2002) effectively subrogated the Davidsons' rights to those of their attorney's (QBSL's) by "*classifying*" QBSL's statements as truthful without proof, i.e. a conclusive presumption, and without providing the Davidsons an

opportunity to challenge the truthfulness of QBSL's statements. The State Court system of Arizona created a constitutionally-impermissible unequal *"classification"* of clients *vis a vis* their attorneys, when Arizona Rule 5.1 was enacted, which is at variance with the equal protection clause of the 14th Amendment.

Davidsons have not only established that Arizona Rule 5.1 and the state action complained of had a disproportionate or discriminatory impact, but also that the action was taken with intent to discriminate, *so as to permanently deny their clients a legal remedy for the crimes alleged in the federal court proceedings and avoid their contractual and professional responsibility to their clients, just 4 months before the scheduled trial date.*

CONCLUSION

Petitioners' request for compensatory damages should have precluded dismissal under *Younger* doctrine. Dismissal was inappropriate because Petitioners' allegations stated a constitutional claim against their privately-retained attorney and his law firm. Petitioners were precluded from raising federal law claims in the state forum. The withdrawal of counsel in the state Action deprived Petitioners of federal constitutional rights. The *"extraordinary circumstances"* exception to *Younger* abstention applies. Rule 5.1 of the Arizona rules of Civil Procedure should be declared unconstitutional on its face or as applied to Petitioners. The federal court dismissals should be reversed, consolidated, and remanded for trial.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

✓FILED ___LODGED
___RECEIVED ___COPY
MAY 4, 2004
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA
DEPUTY

ROBERT M. DAVIDSON; et al.,
Plaintiffs - Appellants,

v.

VIVRA INC., et al.,
Defendants - Appellees.

No. 03-17342
D.C. No. CV-03-00110-FRZ

JUDGEMENT

Appeal from the United States District Court for the District of Arizona (Tucson).

This case came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgement of the said district Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered Monday, April 4, 2005

A TRUE COPY
CATHY A CATTERSON
Clerk of Court
ATTEST

APR 26 2005

by "S/ S. Wall
DEPUTY Clerk

FILED
APR 04 2005
CATHY A. CATTERSON CLERK
U.S.COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. DAVIDSON; et al., Plaintiffs-Appellants, v. VIVRA INC.; et al., Defendants-Appellees	No. 03-17342 D.C. No. CV03-00110-FRZ **MEMORANDUM***

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Submitted March 23, 2005**

Before: B. FLETCHER, TROTT, and PAEZ, Circuit Judges.

Robert M. Davidson appeals pro se the districts court's judgement dismission his action pursuant the *Younger* abstention doctrine. We have jurisdiction under 28 U.S.C. § 1291. After de novo review, *Baffert v. Calif. Horse Racing Bd.*, 332F.3d 613, 617 (9th Cir. 2003), we affirm.

---

* This disposition is not appropriate for publication and my not be cited to or by the courts of this circuit except as provided by Ninth circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Davidson requested that the district court stay the ongoing proceedings in *Grossman v. Davidson*, Pima County Superior Court Case No. C-333954 (the "State Action"). Thus, there is "no doubt" that the federal injunctive relief would interfere directly with those proceedings. "*Baffert*, 332 F.3d at 617 (*Younger* abstention proper where party sought to enjoin state administrative proceedings).

Contrary to davidson's contention, *Younger* abstention is not limited to criminal proceedings. *See Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 799 (9th Cir. 2001) ("The *Younger* principle applies to civil proceedings...in which important state interests are involved."). Davidson's allegation that the Arizona statutory scheme regarding the withdrawal of counsel is unconstitutional is sufficiently important to invoke *Younger* abstention. Furthermore, there is no support for Davidson' contention that he was precluded from raising federal law claims in the state forum. *See Am. Consumer Publ'g Ass'n, Inc. v. Margosian*, 349 F.3d 1122, 1127 (9th Cir. 2003) ("Federal courts presume that a state court is competent to determine issues of federal law, even if those issues involve federal constitutional claims."). Finally, Davidson contends that the withdrawal of counsel in State action deprived him of his federal constitutional rights and that the "extraordinary circumstances" exception to *Younger* abstention therefore applies. This contention lacks merit. *See Baffert*, 332 F.3d at 621 ("[T]he constitutional dimension of the error claimed does not, by itself, constitute an exception to the application of *Younger* abstention.").

Davidson's remaining contentions are similarly unpersuasive.

We deny all pending motions.

AFFIRMED.

A TRUE COPY
CATHY A.
CATTERSON
Clerk of Court
ATTEST
APR 26 2005
by: "/S S. Wall
Deputy Clerk

FILED LODGED
RECEIVED COPY
MAY2 2005
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY, DEPUTY

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. DAVIDSON; et al.,
Plaintiffs -Appellants,
v.
MICHEL J. MEEHAN; et al.,
Defendants-Appellens.

No. 04-15304
D.C. No. CV-03-00580-FRZ

JUDGEMENT

Appeal from the United States District Court for the District of Arizona (Tucson).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgement of the said District Court in this cause be, and hereby is
AFFIRMED.

Filed and entered Monday, April 04, 2005.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

APR 26 2005

by: "/S S. Wall
Deputy Clerk

FILED
APRIL 04 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT M. DAVIDSON; et al., Plaintiffs-Appellants, v. MICHAEL J. MEEHAN: et al., Defendants-Appellees.	No. 04-15304 D.C. No. CV-03-00580-FRZ **MEMORANDUM***

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Submitted March 23, 2005**

Before: B. FLETCHER, TROTT, and PAEZ, Circuit Judges

Robert M. Davidson and his spouse Vanessa Komar appeal pro se the district court's judgement dismissing their action in which they alleged constitutional violations and various state-law claims against their former attorney and his law firm. We have jurisdiction under 28 U.S.C. § 1291. We review de novo whether *Younger* abstention applies. *Baffert v. Calif. Horse Racing Bd.*, 332 F.3d 613, 617 (9th Cir. 2003). We affirm.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Although appellant's request for compensatory damages may preclude dismissal under *Younger* abstention, see *Gilbertson v. Albright*, 381 F. 3d 965, 968 (9th Cir. 2004)(en banc), we may affirm dismissal on any ground supported by the record, *see Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Dismissal was appropriate because appellants' allegations fail to state constitutional claim against their privately-retained attorney and his law firm. *See Briley v. State of Cal.*, 564 F.2d 849, 855 (9th Cir. 1977) ("We have repeatedly held that a privately-retained attorney does not act under color of state law for purposes of actions brought under the Civil Rights Act.")

Appellants' remaining contentions lack merit.

We deny all pending motions.

AFFIRMED.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
APR 26 2005

by: _____
Deputy Clerk

APPENDIX C

COPY
NOV 26 2004
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

THE LAW FIRM OF
KARP, HEURLIN & WEISS, P.C.
3060 NORTH SWAN ROAD, SUITE 100
TUCSON, ARIZONA 85712-1225
TEL (520) 325-4200
FAX (520) 325-4224
Bruce R. Heurlin, PCC# 25508
Attorneys for Jay Grossman and Eudice Grossman

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife, Plaintiffs, vs. ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a.k.a. VANESSA E. KOMAR, husband and wife, Defendants.	No. 333954 **JUDGEMENT** (Judge Jane L. Eikleberry)
ROBERT MICHAEL DAVIDSON and VANESSAKOMAR, Defendants/Counterclaimants, vs. JAY GROSSMAN and EUDICE GROSSMAN, Plaintiffs/Counterdefendants.	

Pursuant to Court's November 9, 2004 Minute Entry and the November 23, 2004, hearing and good cause appearing, Judgement is entered on all Counts of the First Amended Complaint and on the Counterclaim in favor of Jay Grossman and Eudice Grossman (Plaintiffs), husband and wife, and against both Robert Michael Davidson and Vanessa Davidson, also known as Vanessa E. Komar, (Defendants), husband and wife, individually, jointly, and severally and as to their marital community.

The Court finds as fact that as to all Counts of the First Amended Complaint and as to frivolous pleadings filed by the Plaintiffs in this action that Defendants acted willfully and

Damages are awwarded in favor of Plaintiffs and against Defendants as follows:

1. Intentional Interference with Contract:
   a. Sale of Medical Practice/Stock Purchase and Sale Agreement $2,493,921.00
   b. Loss of Salary $3,261,699.00
2. Intentional Defamation, Slander, and Slander Per Se, Damage to Professional and Personal Reputation $1,035,111.00
3. Intentional Abuse of Process $----------. and
4. Intentional Infliction of Emotional Distress $500,000.00
5. Punitive Damages $500,000.00
6. Sanctions:
   a. Reimbursement of costs and attorneys' fees $58,300.27
   b. Sanctions in addition to the above $ ---0---.

Judgement is so ordered in favor of Plaintiffs and against Defendants in the total amount of $7,849,031.27.

The total amount of this judgement shall earn interest at the legal rate of 10% per annum from the date of this Judgement until paid in full.

DATED November 24,2004.

Jane L. Eikleberry
JANE L. EIKLEBERRY
Judge, Pima County Superior Court

FILED BY CLERK
NOV 26 2003
COURT OF APPEALS
DIVISION TWO

APPENDIX D

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MANDATE
2 CA-CV 2002-0051
Department B
Pima County
Cause No. 333954

RE: GROSSMAN v. DAVIDSON
To: The Superior Court of Pima County and the Hon. Jane L. Eikleberry, Judge, in relation to Cause No. 333954.

This cause was brought before Division Two of the Arizona Court of Appeals in the manner prescribed by law. This court rendered its Memorandum Decision and it was filed on February 27, 2003.

No Motion for Reconsideration was filed and the time for filing such has expired.

A Petition for Review was filed and DENIED by Order of the Arizona Supreme Court.

PLAINTIFFS/APPELLEES are granted attorney's fees on appeal in the amount of Six Thousand Seven Hundred Sixty-Seven and 50/100 Dollars ($6,767.50) and granted costs on appeal in the amount of Two Hundred Eleven and 01/100 Dollars ($211.01) by the Arizona Court of Appeals, Division Two.

NOW THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the Memorandum Decision of this Court, a copy of which is attached Hereto.

I, Jeffry P. Handler, Clerk of the Court of Appeals, Division Two, hereby certify the attachment to be a full and accurate copy of the Memorandum Decision filed in this cause on February 27, 2003.

IN WITNESS WEREOF, I hereunto set my hand and affix the official seal of the Arizona Court of Appeals, Division Two, on November 26, 2003.

Jeffrey P. Handler
Clerk of the Court

APPENDIX E

Arizona Rules of Civil Procedure

Rule 5.1. Duties of Counsel

(A) Attorney of Record: Withdrawal and Substitution of Counsel.
(2) Withdrawal and Substitution. Except where provided otherwise in any local rules pertaining to domestic relations cases, no attorney shall be permitted to withdraw, or be substituted, as attorney of record in any pending action except by formal written order of the court, supported by written application setting forth the reasons therefore together with the name, residence and telephone number of the client, as follows:
(B) Where such application does not bear the written approval of the client, it shall be made by motion and shall be served upon the client and all other parties or their attorneys. The motion shall be accompanied by a certificate of the attorney making the motion that (i) the client has been notified in writing of the status of the case including the dates and times of any court hearings or trial settings, pending compliance with any existing court orders, and the possibility of sanctions, or (ii) the client cannot be located or for whatever other reason cannot be notified of the pendency of the motion and the status of the case.
(C) No attorney shall be permitted to withdraw as attorney of record after an action has been set for trial, (i) unless there shall be endorsed upon the application therefore either the signature of a substituting attorney stating that such attorney is advised of the trial date and will be prepared for trial, or the signature of the client stating that the client is advised of the trial date and has made suitable arrangements to be prepared for trial, or (ii) unless the court is satisfied for good cause shown that the attorney should be permitted to withdraw.

APPENDIX F

FILED LODGED
RECEIVED COPY
NOV 24 2003
CLERK US DISTRICT COURT
DISTRICT OF ARAZONA

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Robert M. Davidson, Vanessa E. Komar, Plaintiffs vs Vivra Inc, et al., Defendant	No. CV03- 110 TUC FRZ **ORDER**

Before the Court for consideration is "Plaintiffs' Motion for Preliminary Injunctive Relief by this Court," filed October 21, 2003. Filed in response is "Defendants Jay and Eudice Grossman's Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief."

Procedural History

Plaintiffs Robert M. Davidson and Vanessa E. Komar, proceeding pro se, filed "Plaintiff's Original Complaint" on February 19, 2003, against 22 named corporate and individual Defendants. The 191 page original complaint alleged 21 counts.

On March 11, 2003, Plaintiffs filed a 144 page Rico Case Statement, with several exhibits attached.

On April 30, 2003, Plaintiffs filed a 328 page First Amended Complaint, against the same 22 named Defendants, alleging 17 separate counts.

On June 6, 2003, Defendants Grossman appeared and filed "Defendants Jay and Eudice Grossman's Motion to Dismiss Pursuant to Rule 8, Federal Rules of Civil Procedure."

On July 1, 2003, the Court granted Defendants Jay and Eudice Grossman's Motion to Dismiss Pursuant to Rule 8 based on the Court's finding "that the prolixity of the First Amended Complaint renders the pleading incomprehensible."

This matter was also stayed pursuant to the Notice of filing of Bankruptcy Petition and of the Automatic Stay filed by Defendants Vivra, Inc., Magellan Specialty Health, Inc. and Allied Special Care Services, LLC.

Plaintiffs were granted leave to file a Second Amended Complaint upon the lifting of the automatic stay in compliance with the pleading requirements of the Federal Rules of Civil Procedure and in accordance with the provisions of the Court's Order, specifically Rule 8(a)(2), which requires a complaint to include only "a short and plain statement of the claim," and Rule 9(b), which requires that "[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

Plaintiffs were warned that "[a]lthough the pleadins of pro se litigants are construed liberally, pro se litigants are nevertheless bound by the federal and local rules of procedure. See Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995)."

Discussion

Although this cause of action is still under the automatic stay provision pursuant to the filing of a bankruptcy provision, Plaintiffs filed the present motion seeking injunctive relief.

There is no operative complaint before the Court.

Plaintiffs' motion seeks "preliminary injunctive relief from this Court in the form of:"

(a) an Order by this Court for a Stay of Pima County Superior Court Case # 333954, pending final adjudication of the federal cause of action (Case #03-111) from which it arises,

(b) an Order by this Court for a Stay of the award of Costs [$211.01] and Attorney's Fees [$6,767.50] to the Grossmans in Arizona Court of Appeals Case # 2 CA-CV

02-0051, pending final adjudication of the federal cause of action (Case # 03-CV 110) from which it arises, and
(c) an Order by this Court for a Stay of the award of Costs [$82.00] and Attorney's Fees [$1,710.00] to the Grossmans in Arizona Supreme Court Case #CV-03-0148-PR, pending final adjudication of the federal cause of action (Case # 03-CV 110) from which it arises, and
(d) an Order for any other relief this Court deems appropriate.

Plaintiffs base their argument in their motion for injunctive relief on the following:

> Plaintiffs (the Davidsons) will suffer irreparable injury if Pima County Superior Court Case # 333954 proceeds to trial prior to final judgment upon the merits of the federal cause of action (Case # 03CV-110-TUC-FRZ) *from which it arises.* PIMA County Superior Court Case # 333954 *arises from* the same nucleus of operative facts alleged by the Davidsons in US District Court Case #03CV100TUC alleged by the Davidsons in US District Court Case # 03CV100TUC FRZ. There is a distinct risk of issue preclusion or claim preclusion, if Pima County Superior Court Case # 333954 proceeds to trial prior to the final judgment upon the merits of 03CV-110-TUC-FRZ.

Although Plaintiffs' initial filings were incomprehensible, it is clear to the court that this action, in its entirety, must be dismissed based on the doctrine of abstention which precludes federal court interference with pending sate judicial proceedings. It is evident, based on Plaintiffs' admissions and requests for relief, as set forth in their motion for preliminary injunction, that this action was filed in federal court, on the premise of supplemental jurisdiction and federal question, to circumvent the ongoing state court proceedings, an abuse of federal judicial resources.

It is clear that this Court lacks jurisdiction over the matters asserted in this federal action and the relief requested

by Plaintiffs in their motion for injunctive relief. The Court need not address the principles of judicial estoppel which also preclude the filing of this action in federal court.

The Court thereby invokes the doctrine of abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), in which the Supreme Court "espouse[d] a strong federal policy against federal-court interference with pending state judicial proceedings." H.C. v. Koppel, 203 F.3d 610, 613 (9th Cir. 2000) (quoting Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423, 431, 102 S.Ct. 2515, 2521 (1982)). "Absent extraordinary circumstances, Younger abstention is required if the state proceedings are (1) ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims." Id.

Plaintiffs have an adequate state forum in which to pursue the issues presented.

Based on the foregoing,

IT IS HERBY ORDERED that this case is **DISMISSED** with all parties to bear their own costs.

IT IS FURTHER ORDERED that all other pending matters are **DENIED** as moot.

There shall be no further filings in this action.

DATED this 20th day of November, 2003.

/s_FRANK R. ZAPATA
United States District Judge

APPENDIX G

__FILED ___LODGED
___RECEIVED ___COPY
FEB 2 2004
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA
BY_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert M. Davidson, Vanessa E. Komar, TUC FRZ
Plaintiffs,

vs.

Michael J. Meehan; Quarles & Brady Streich Lang
Defendants

No. CV 03-580
ORDER

The present action commenced with the filing of Plaintiffs' Original Complaint & Application for Injunctive Relief against Defendants Michael J. Meehan and Quarles & Brady Streich Lang. The pleading alleges, inter alia that "[t]he Arizona state courts...have effectively stripped the Davidsons of their former attorney of record...without Due Process or Equal Protection, in violation of the Contract Clause, Takings Clause, and 14th Amendment of the U.S. Constitution."[1]

Plaintiffs' claims appear to arise from a state court ruling granting a motion to withdraw as attorney of record in state court proceedings, filed by Defendant Meehan, who had been retained to represent in the state court action. Plaintiffs' complaint refers repeatedly to facts and allegations arising

[1] Plaintiffs' Original Complaint & Application for Injunctive Relief, Page 5,¶ 24.

out of state court proceedings and a previously filed district court action, which was dismissed on November 23, 2003, four days after the filing of this action on November 20, 2003, in which Plaintiffs had similarly moved for injunctive relief.

Defendants filed a Motion to Dismiss in response to Plaintiffs' Original Complaint & Application for Injunctive Relief on December 22, 2004, now before the Court for consideration.

Defendants move the court to dismiss the present case based on their contention that "there is no Constitutional right to counsel in civil case" and, "...original subject matter jurisdiction for this case is not present." Defendants conclude that "[a]s a result, this Court cannot retain supplemental jurisdiction over plaintiffs' state law based claims and thus, the entire case should be dismissed."

Plaintiffs filed their Objection to Motion to Dismiss in response to Defendants' motion, contending that they "sought relief for this irrevocable injury in their Motion for Preliminary Injunctive Relief in U.S. District court Case 03CV-110 TUC-FRZ...presently on appeal to the 9th Circuit Court of Appeals..."

Defendants' motion to dismiss addresses Plaintiffs' cause of action on the merits of the claims asserted, arguing that Plaintiffs have failed to allege the infringement of a constitutionally protected right, specifically a constitutional right to counsel in a civil case, and therefore, there is no basis for federal subject matter jurisdiction. The Court finds however, that Plaintiffs' cause of action has not been brought properly before this Court.

The Court dismissed Plaintiffs' previous action by Court order and judgment, filed November 24, 2003, under the doctrine of abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), in which Plaintiffs moved for injunctive relief, alleging: Plaintiffs (the Davidsons) will suffer irreparable injury if Pima County Superior Court Case # 333954 proceeds to trial prior to final judgment upon the merits of the federal cause of action (Case # 03CV-110-TUC-FRZ) *from which it arises*. PIMA County Superior Court Case # 333954 *arises*

from the same nucleus of operative facts alleged by the Davidsons in US District Court Case # 03CV100TUC FRZ.

In dismissing the previous action, the Court found that "[a]lthough Plaintiffs' initial filings were incomprehensible, it is clear to the Court that this action, in its entirety, must be dismissed based on the doctrine of abstention which precludes federal court interference with pending state judicial proceedings."

The Court further held that ""[I]t is evident, based on Plaintiffs' admissions and requests for relief, as set forth in their motion for preliminary injunction, that this action was filed in federal court, on the premise of supplemental jurisdiction and federal question, to circumvent the ongoing state court proceedings, an abuse of federal judicial resources." The Court further explained that it "need not address the principles of judicial estoppel which also preclude the filing of this action in federal court" and that "[I]t is clear that this Court lacks jurisdiction over the matters asserted in this federal action and the relief requested by Plaintiffs in their motion for injunctive relief."

The Court concluded that Plaintiffs have an adequate state forum in which to pursue the issues presented. Plaintiffs filed a notice of appeal.

In the present action, Plaintiffs appear to be attempting to raise issues arising from the same cause of action and events that originated in the Arizona state courts. Plaintiffs' Original Complaint & Application for Injunctive Relief fails to comply with the requirements of Rule 8(a)(2), which requires a complaint to include only "a short and plain statement of the claim," and Rule 9(b), which requires that "[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." These requirements were set forth by Court order in the previous action, CV 03-110 TUC FRZ, along with the warning that "[although the pleadings of pro se litigants are construed liberally, pro se litigants are nevertheless bound by the federal and local rules of procedure." See Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir.

1995). Plaintiffs' Original Complaint & Application for Injunctive Relief includes, but is not limited to, the following allegations: Opposing counsel in Pima County Case 333954 inappropriately aligned their interests with those of Mr. Meehan and Q&BSL during the Davidsons' appellate action to the Arizona court of Appeals as is amply demonstrated by their Answer Brief and Opposition to Petition for Review. The *possibility* of a prior association between any of the counsel of the firm Quarles & Brady LLP [in any state or federal jurisdiction] and any of the named defendants [or their Counsel] in U.S. District Court Case # 03CV-110-TUC-FRZ, is of grave concern to the Davidsons. The Davidsons pray for this court to allow discovery on this question. Such a question is readily subject to discovery, assuming that any records documenting such an association have not been destroyed. This is particularly relevant at this time because a number of the named corporate defendants [Vivra Inc, Magellan Specialty Health Inc, Allied Specialty Care Services Inc, and Health Technologies Inc] in Case #03CV-110-TUC-FRZ are presently in the process of disposing of their assets [*and records?*] in a Chapter 11 Bankruptcy proceeding filed on March 11, 2003, in the U.S. Bankruptcy Court, Southern District of New York [In Re: Magellan Health Services Inc., Case No. 03-40515 (PCB), Jointly Administered]. Case #03CV-110-TUC-FRZ is presently stayed by the filing for Automatic Stay under the Bankruptcy Code.

As of the filing of this complaint, Mr. Meehan appears no longer to be an associate of the law firm Quarles & Brady Steich Lang. According to the State Bar of Arizona Member Finder, Mr. Meehan *now* works for the law firm, The Law Offices of Michael J. Meehan, and he appears to *now* no longer be an associate of Quarles 7 Brady Steich Lang. Thus, Mr. Meehan is an attorney who has moved between law firms, *frequently*. The plaintiffs will produce evidence at trial that this movement between law firms [during Mr. Meehan's attorney-client

---

[2] Plaintiffs' Original Complaint & Application for Injunctive Relief, ¶¶39,40, 41.

relationship with the Davidsons] inured to detriment of his clients (the Davidsons) in Pima County Case #333954, in more ways than one. This movement between law firms was not part of the benefit bargained-for when the davidsons retained Mr. Meehan as their legal counsel in Pima County Case #333954.[2]

As evidence by Plaintiffs' Exhibits in Support of Objection to Motion to Dismiss, this case centers around the state court controversies the Plaintiffs tried to raise in their previous federal action. The Court again, finding that Plaintiffs have an adequate state forum in which to pursue the issues presented, invokes the doctrine of abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746 (1971), which "espouse[s] a strong federal policy against federal-court interference with pending state judicial proceedings." H.C. ex rel. Gordon v. Koppel, 203 F.3d610, 613 (9th Cir.2000) (quoting Middlesex County Ethics Committee v. Garden State Bar Ass'n., 457 U.S. 423, 431, 102 S.Ct. 2515, 2521 (1982). The Court does not find extraordinary circumstances to intercede in the ongoing state court proceedings in which Plaintiffs have adequate opportunity to litigate any alleged federal claims. See Id.

Notwithstanding this finding, as Defendants assert, "it is well-established that there is generally no constitutional right to counsel in civil cases. " United State v. Sardone, 94 F.3d 1233, 1236 (9th Cir 1996) (citing Hedges v. Resolution Trust Corp., 32 F.3d 1360, 1363 (9th Cir. 1994) cert. denied, 514 U.S. 1082, 115 S.Ct. 1792 (1995)).

Based on the foregoing,
IT IS HEREBY ORDERED that this case is **DISMISSED** with all parties to bear their own costs.

Judgment shall be entered accordingly.

DATED this 30th day of January, 2004.

/s FRANK R. ZAPATA
United States District Judge

APPENDIX H

FILED
PATRICIA A. NOLAN
CLERK, SUPERIOR CT
April 29, 2004 (11:27)
By: Kitty Vroman

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. JANE L. EIKLEBERY — CASE NO. **C-333954**
COURT REPORTER: NONE — DATE: April 29, 2004

JAY GROSSMAN and EUDICE GROSSMAN, h/w,
Plaintiffs,
vs.
ROBERT MICHAEL DAVIDSON and VANESSA DAVIDSON, a/k/a VANESSA E. KOMAR, h/w
Defendants

ROBERT MICHAEL DAVIDSON and VANESSA E. KOMAR, h/w
Defendants/Counterclaimants,
v.

JAY GROSSMAN and EUDICE GROSSMAN, h/w,
Plaintiffs/Counterdefendants.

MINUTE ENTRY

IN CHAMBERS RULINGS RE: DEFENDANTS' MOTION TO AMEND DEFENDANTS' ANSWER, TO ADD COUNTER CLAIMS AND ADD PARTIES, PLAINTIFFS' MOTION TO REQUIRE DEFENDANTS TO PAY PLAINTIFFS FOR COSTS AND ATTORNEYS' FEES ASSESSED FOR FRIVOLOUS APPEALS, DEFENDANTS' MOTION TO ENLARGE TIME

TO FILE RULE 26.1 DISCLOSURE STATEMENT AND DEFENDANTS' MOTION TO ENLARGE TIME FOR THE DISCOVERY DEADLINE

The Court has reviewed all of the motions, oppositions and replies submitted. The complaint in this action was filed on July 2, 1999. The case is set for trial on October 13, 2004. On January 20, 2004, the parties were ordered to comply with Rule 26.1 on or before Friday, March 19, 2004. The discovery deadline was set for Friday, April 30, 2004.

Kitty Vroman, Deputy Clerk
By George Hofmeister, J.A.A.

MINUTE ENTRY

Defendants belatedly seek to unnecessarily enlarge the scope of this action to include claims and parties, some, if not all, of which are presently before the 9th Circuit Court of Appeals. Defendant Robert Michael Davidson was advised of the trial date, the deadline for complying with Rule 26.1 and the discovery deadline during the status conference of January 20, 2004. The motion to enlarge the deadlines during the status conference of January 20, 2004. The motion to enlarge the deadlines was filed after the disclosure deadline. Defendants' motions appear to be filed for purposes of delay and harassment. To allow the extensive proposed amendments to the answer and the counterclaim would greatly prejudice the plaintiffs given that the trial date is set for October 13, 2004. This case has been pending for almost five years and absent extraordinary and unforeseen circumstances, the trial date will not be continued.

Defendants' motion to amend their answer to add counterclaims and parties and defendants' motion to enlarge the time to comply with Rule 26.1 and to extend the discovery deadline are hereby denied.

Plaintiffs' motion for sanctions is hereby denied at this time with leave granted to refile the motion if warranted. Defendants are warned that filing groundless motions, taking actions primarily for delay or harassment, and attempts to unreasonably expand or delay the proceeding may result in the imposition of sanctions including , but not limited to, the striking of their counterclaim, the striking of their answer, entering of a default against them, and an award of additional attorneys' fees and costs to plaintiff.

Defendants delivered a copy of their disclosure statement to the Court. Defendants are advised that disclosure statements are neither filed with the clerk or copied to the court.

cc: Bruce Heurlin, KARP, HEURLIN & WEISS, P.C.
Robert Davidson & Vanessa Komar, P.O. Box 1785, Kilgore, TX 75663-1785

FILED BY CLERK
FEB 27 2003
COURT OF APPEALS
DIVISION TWO

APPENDIX I

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAY GROSSMAN and EUDICE GROSSMAN, husband and wife, Plaintiffs/Appellees,	2 CA-CV 2002-0051 DEPARTMENT B
v.	**MEMORANDUM DECISION** Not for Publication Rule 28, Rules of Civil Appellate Procedure
ROBERT MICHAEL DAVIDSON, Defendant/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY
Cause No. 333954
Honorable Jane L. Eikleberry, Judge

APPEAL DISMISSED

Karp, Heurlin & Weiss, P.C. — Tucson
By Bruce R. Heurlin — Attorneys for Plaintiffs/Appellees

Robert M. Davidson — Kilgore, Texas
In Propria Persona

D R U K E, Presiding Judge

¶1 Jay and Eudice Grossman sued Robert and Vanessa Davidson for defamation, slander, and other related counts. Four months before trial, the Davidsons' attorney moved to withdraw as counsel and to continue the trial. The Davidsons did not respond to the motion and the Grossmans had no objection to it. On January 11, 2002, the trial court entered an order granting the motion to withdraw and rescheduled the trial. On February 13, Robert Davidson filed a notice of appeal "from the order made and entered in this action on the 11th day of January, 2002." For the reasons that follow, we dismiss the appeal for lack of jurisdiction.

¶2 In a civil case, "the right to appeal is not absolute but exists only by statute." *Southern Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶16, 977 P.2d 769, ¶16 (1999); *see also In re Pima County Juvenile Action No. S-933*, 135 Ariz. 278, 660 P.2d 1205 (1982) (substantive right to appeal created only by constitution or statute). Civil appeals are governed by A.R.S. § 12-2101, which limits this court's jurisdiction to those matters set forth in the statute. See Ariz. Const. Art. VI, § 9; A.R.S. § 12-120.21; *Truck Ins. Exch. V. State Compensation Fund,* 138 Ariz. 116, 117, 673 P.2d 314, 315 (App. 1983) ("[T]he right to appeal and orders which are reviewable on appeal are strictly statutory."); *Campbell v. Arnold*, 121 Ariz. 370, 590 P.2d 909 (1979) (court of appeals only has jurisdiction given by statute).

¶3 The Grossmans point out that the order granting counsel's motion to withdraw does not come "within any of the categories of appealable orders." In response, Davidson asserts that this appeal comes within § 12-2101(D), which permits an appeal "[f]rom any order affecting a substantial right made in any action when the order in effect determines the action and prevents judgement from which an appeal might be taken." He argues that "[t]he substantial rights in this appeal are the Constitutionally-protected rights to Due Process, Equal Protection, and right to Contract" and that "[t]he order appealed from, in effect, determine[d] the action." (Emphasis omitted.)

¶4 Although we might agree that the rights to which Davidson refers are substantial, we cannot agree that the trial court's order permitting his counsel to withdraw determined the action that the Grossmans filed against him. That "order did not finally dispose of the case, leaving no question open for judicial determination." *Eaton v. Unified Sch. Dist. No. 1 of Pima County,* 122 Ariz. 391, 392, 595 P.2d 183, 184 (App. 1979).

---

[1]Both the notice of appeal and the opening brief state that Robert Davidson is "representing" the defendants. He may represent himself, but because he is not an attorney admitted to the practice of law, he cannot represent his wife. *See Haberkorn v. Sears, Roebuck & Co.*, 5 Ariz. App. 397, 427 P.2d 378 (1967)

The order simply allowed Davidson's attorney to withdraw his representation and continued the date for a trial on the merits. The order was, in fact, interlocutory, this is, "interim or temporary, not constituting a final resolution of the whole controversy." *Black's Law Dictionary 819* (7th ed. 1999). And interlocutory orders are generally noappealable. *See Southern Cal Edison*, 194 Ariz. 47, ¶16, 977 P.2d 769, ¶16 (legislature's express listing in § 12-2101 of appealable judgements and orders makes clear that "most *interlocutory orders*... are not appealable"); *Security Gen. Life Ins. Co. v. Superior Court*, 149 Ariz. 332, 333, 718 P.2d 985, 986 (1986) (order disqualifying counsel from representing party "is not a final order and in therefore not appealable"); *Riley, Hoggatt & Suagee, P.C. v. Riley*, 165 Ariz. 138, 796 P.2d 940 (App. 1990) (order denying counsel's motion to withdraw representation not appealable); *Eaton* (§ 12-2101(d) does not permit appeal from interlocutory order allowing case to proceed as class action). Accordingly, we conclude that the trial court's order allowing Davidson's counsel to withdraw is a nonappealable interlocutory order.

¶5 But even is we were to assume that the order is appealable, because Davidson did not file his notice of appeal until February 13, it was not filed within the thirty days required by Rule 9(a), Ariz. R. Civ. App. P., 17B A.R.S. The relevant part of Rule 9(a) states that a "notice of appeal... shall be filed with the clerk of the superior court not later than 30 days after the entry of judgement from which the appeal is taken." Rule 2(d), Ariz. R. Civ. App. P., defines "[j]udgement" as "any appealable order, weather denominated an order, a judgement, a decree, or otherwise." Thus, even if the order were appealable, we would still lack jurisdiction to review it because Davidson failed to timely file the notice of appeal. *See Butler Products Co. v. Roush*, 145 Ariz. 32, 32, 699 P.2d 906, 906 (App. 1984) ("Appellate courts do not have jurisdiction to consider appeals which are not timely filed."); *Pina County No. S-933* (failure to file timely appeal deprives appellate court of jurisdiction).

¶6 For the forgoing reasons, we dismiss for lack of jurisdiction Davidson's appeal from the trial court's January 11 interlocutory order granting his attorney's motion to withdraw as counsel. We also grant the Grossmans costs and attorney's fees on appeal, finding, for the reasons set forth in the answering brief, that Davidson filed a frivolous appeal. Ariz. R. Civ. App. P. 25, 17B A.R.S. Costs and attorney's fees will be awarded to the Grossmans upon their compliance with Rule 21, Ariz. R. Civ. App. P.

/s WILLIAM E. DRUKE, Presiding Judge

CONCURRING;

/s PHILIP G. ESPINOSA, Chief Judge

/s JOHN PELANDER, Judge

FILED
SEP 15 2003
NOEL K. DESSAINT
CLERK SUPREME
COURT

APPENDIX J

SUPREME COURT OF ARIZONA

JAY GROSSMAN and EDUICE GROSSMAN, husband and wife,	Arizona Supreme Court No. CV-03-0148-PR
Plaintiff/Appellee,	Court of Appeals Division Two No. 2 CA-CV 02-0051
v.	Pima County Superior Court
ROBERT MICHAEL DAVIDSON	No. 333954
Defendant/Appellant.	**ORDER**

On August 8, 2003, this Court issued a minute letter granting Attorneys' Fees to Appelles Jay Grossman and Eudice Grossman. A "Plaintiffs-Appellees' Verified Itemized Statement of Costs and Attorney's Fees" was filed on August 22, 2002. Pursuant to Rule 21, Rules of Civil Appellate Procedure and this Court's minute letter of August 8, 2003, and the Clerk having been authorized to tax costs and attorneys fees, and no objection having been received from Appellant Robert Michael Davidson.

IT IS ORDERED granting Appellees Jay Grossman and Eudice Grossman attorney's fees in the amount of One Thousand Seven Hundred Ten and 00.100 Dollars ($1,710.00) and costs in the amount of Eighty-Two and 00/100 Dollars ($82.00).

DATED this 15th day of September, 2003.

/s NOEL K. DESSAINT
Clerk of the Court

TO:
Bruce R. Heurlin, Karp Heurlin & Weiss PC
Robert Michael Davidson
rd

__FILED __LODGED
__RECEIVED __COPY
APR 27 2004
CLERK US DISTRICT COURT
DISTRICT OF ARIZONA
DEPUTY

APPENDIX K

FILED
APR 16 2004
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-17342

ROBERT M. DAVIDSON
Plaintiff - Appellant,
v.
VIVRA INC.; ET AL.,
Defendants - Appellees.

D.C. No. CV-03-00110-FRZ
District of Arizona,
Tucson

ORDER

The Parties have stipulated to the dismissal of this case under the Federal Rule of Appellate Procedure 42(b). The case is dismissed as to appellees Vivra, Inc. Magellan Specialty Health, Inc., and Allied Specialty Care Services, LLC f/k/a Allied Specialty Care Serviced, Inc. ONLY.

Costs shall be allocated pursuant to the terms of the stipulation.

A certified copy of this order sent to the district court shall act as and for the mandate of this court as to appellees Vivra, Inc. Magellan Specialty Health, Inc., and Allied Specialty Care Services, LLC f/k/a Allied Specialty Care Services, Inc. ONLY.

A TRUE COPY
CATHY A. CATTERSON
CLERK OF COURT
ATTEST
APRIL 16 2004
BY:/sDonna Gilmore
DEPUTY CLERK

For the Court

CATHY A. CATTERSON
Clerk of the Court

/sLorela Bragado-Sevillena
Deputy Clerk

Ninth Circuit Rule 27-7/ Advisory Note
to Rule 27 and Ninth Circuit Rule 27-10

pro 4.12

Supreme Court, U.S.
FILED
AUG 2 2 2005
OFFICE OF THE CLERK

(2)

No. 04-1687

In The
Supreme Court of The United States

ROBERT M. DAVIDSON and
VANESSA E. KOMAR,
Petitioners
v.

VIVRA INC,
MICHAEL J. MEEHAN,
QUARLES BRADY STREICH LANG LLP,
et al
Respondents

On Petition For Writ of Certiorari
As to Two Final Judgments of the Ninth Circuit
United States Court of Appeals

SUPPLEMENTAL BRIEF

ROBERT DAVIDSON
Petitioner Pro Se
1009 N. 4th Street, St. B
Longview, TX 75601
903-758-1900

SUPPLEMENTAL BRIEF

Petitioners [referred to herein as "Davidsons"] submit this supplemental brief pursuant to this Court's Rule 15.8, while petition for writ of certiorari (U.S. Supreme Court Docket 04-1687) is pending, so that attention may be called to new cases and "*other intervening matter*" not available at the time of initial filing [***see Issue #2 below, paragraphs 1 and 2***].

[ABBREVIATED] STATEMENT OF THE CASE

Albany County Case # 2960-91, settled on January 10, 1996, in Albany, NY provides irrefutable evidence of pattern of misconduct and overt acts of conspiracy by the Grossmans, *and others,* acting in concert. The FDA Tucson EIR (Establishment Inspection Report) of 5/5-6/28/99, also provides irrefutable evidence of pattern of misconduct and overt acts of conspiracy by the Grossmans *and others,* acting in concert. Both Vivra Inc and the Grossmans had "*unclean hands*" when they recruited (fraudulently induced) Davidson's employment in Tucson, AZ in September of 1998. The conspiracy to defraud by the federal court defendants, began in Albany, NY. It should have been stopped in Albany, NY by state and/or federal regulators. The Davidsons bore the consequences of the conspiracy in Tucson, AZ. Because of his belief in the AMA Principles of Medical Ethics and Oath of Hippocrates, Davidson "*blew the whistle*" on Grossman in April 14, 1999, in his letter to Dr Antoine El Hage of FDA.

The final judgments of the U.S. District Court dismissing Davidsons' federal causes of action [in both federal court proceedings CV-03-00110-FRZ and CV-03-00580-FRZ] under *Younger* doctrine were *clearly erroneous*. The federal court dismissals should be reversed, consolidated, and remanded for trial. This Court may vacate the dismissals on any ground supported by the record, including the issues raised on appeal to the Ninth Circuit (Docket 03-17342 and Docket 04-15304) and the issues found in Davidsons' Petition for Writ of Certiorari before Judgment (U.S. Supreme Court Case 04-537, cert. denied) filed on September 17, 2004.

1. Davidsons' request for compensatory damages should have precluded dismissal under *Younger* doctrine

Davidsons' federal causes of action sought damages under 18 USC Section 1964(c) and 42 USC Section 1983. This Court has not explicitly decided whether the *Younger* abstention doctrine covers actions for damages as well as equitable relief with respect to 42 USC Section 1983 claims and 18 USC Section 1964(c) claims. See

Gilbertson v. Albright, 381 F.3d 965, *Canatella v. California*, 404 F.3d 1106, and *Marran v Marran*, 376 F.3d 143. Davidsons requested compensatory and punitive damages in their Original Complaint to the U.S. District Court against MJM and QBSL. See Appellees' SER Volume 2, Tab 21 at pages 502-505, in Ninth Circuit Case 03-17342. Davidsons also requested compensatory and punitive damages in their Original and First Amended Complaint to the U.S. District Court against Vivra Inc, et al. See Appellees' SER Volume 1, Tab 1 at pages 331-332, in Ninth Circuit Case 03-17342. Davidsons now have no competent forum [***see Issues #2 and #3 below***], either state or federal, in which to timely raise their federal Constitutional concerns. Comity [the evolving concept of our Federalism] goes too far if it gives inadequate attention to federal interests. *DeSpain v. Johnson*, 731 F.2d 1171 (1984).

II. Dismissal was inappropriate because Davidsons' allegations stated a constitutional claim against their privately-retained attorney and his law firm

Structural Bias in the State Court Proceedings

Petitioners have recently learned that MJM was candidate for several vacancies on the bench of the Arizona Court of Appeals (Division II) and Arizona Supreme Court from 2002 to 2003, during the time when Davidsons' interlocutory appeal and petition for review were before the Arizona appellate courts. See newspaper article from the April 15, 2002, issue of the Tucson Citizen, entitled "*7 Tucsonans up for high court seat*". See December 2002, Volume 22, Number 12, page 1, issue of the Maricopa Lawyer. See May 2002, Volume 22, Number 5, page 1, issue of the Maricopa Lawyer. See January 2003, Volume 23, Number 1, page 1, issue of the Maricopa Lawyer. See April 8, 2002, and April 25, 2002, press releases, downloaded from the archives of the Arizona Supreme Court, entitled "*15 Applicants Apply for Arizona Supreme Court Position*" and "*Public Input Sought on Candidates for Supreme Court*", respectively.

Petitioners have also recently learned that MJM served as law clerk to then Associate Justice William H. Rehnquist of the U.S. Supreme Court (1971), MJM was president of the American Academy of Appellate Lawyers, and MJM was a member of the Advisory Committee on Appellate Rules. See September 27, 2003, issue of the Tucson Citizen. See Minutes of Fall 1999 Meeting of Advisory Committee on Appellate Rules on October 21 & 22, 1999, in Tucson, Arizona.

These facts are readily verifiable because copies of the newspaper press releases from 2002-2003 can be found and downloaded directly from the Arizona Supreme Court

internet website. Copies of the newspaper articles can be obtained from archive departments of the Maricopa Lawyer and the Tucson Citizen. These facts provide this Court with more than just vague conclusory allegations of structural bias in the Arizona judicial system. The Arizona judicial system is institutionally biased. There exist circumstances in the State court proceedings indicating a probability of bias too high to be constitutionally tolerable.

"To perform its high function in the best way, justice must satisfy the appearance of justice". See *Republican Party of Minnesota v. White*, 122 S.Ct. 2528, at page 31, quoting *In re Murchison*, 349 U.S., at 136, 75 S.Ct. 623, quoting *Offutt v. U.S.*, 348 U.S. 11, 14, 75 S.Ct. 11. *"The legitimacy of the Judicial Branch ultimately rests on public faith in those who don the robe".* See *Mistretta v. U.S.*, 488 U.S. 361, 407, 109 S.Ct. 647.

The State Court proceedings themselves violated Davidsons' constitutional rights. Submission to a fatally biased adjudicator constitutes ongoing, independent injury that requires immediate judicial relief. This Court has considered recusal mechanisms ineffective where, as here, Petitioners allege structural bias that would not be addressed by the substitution of particular adjudicators. The Arizona judicial system does not measure up to the yardstick of what an impartial adjudicator should be in accordance with Due Process. Davidsons have suffered and continue to suffer ongoing irreparable injury, which is both great and immediate, in the Arizona court system. Younger abstention doctrine is subject to bias exception when core constitutional values are threatened during ongoing state proceedings, and there is showing of irreparable-harm that is both great and immediate. ***The unavailability of interlocutory review of Davidsons' Due Process claim in State courts represents a strong showing of irreparable harm.***

Davidsons allege facts which overcome the presumption of honesty, integrity, good faith, and impartiality in those serving as adjudicators in the Arizona judicial system. Davidsons allege facts which provide prima facie evidence for serial violations of 28 USC Section 455 (a) by the State Actors, acting in concert. A Judge shall disqualify himself [herself] "in any proceeding in which his [her] impartiality might reasonably be questioned". Davidsons allege facts which provide further evidence in support of violations by the State Actors, acting in concert, of 42 USC Section 1983, Section 1985, and Section 1988. Davidsons allege facts which provide strong support for their claim of "extraordinary circumstances". Davidsons allege facts which provide strong support for the Gibson exception to Younger abstention. See *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689.

Being subjected to biased proceedings is a due process

violation independent of the fines that have already been imposed, and thus Davidsons are suffering an ongoing irreparable harm necessitating federal intervention. Gibson exception allows a federal court to intervene where the state adjudicator is so biased as to be incompetent to adjudicate the matter and where the petitioners show that abstention has resulted in irreparable harm. ***State law barred Davidsons from obtaining interlocutory review of their Due Process claim in State courts, thus establishing irreparable-harm criterion for Younger bias exception****. The bias exception to Younger abstention doctrine may apply even in event that party objecting to biased state proceeding has available to it eventual judicial review of state decision, if proceedings themselves subject party to irreparable-harm (Due Process violation). The federal court dismissals under the Younger doctrine were clearly erroneous.*

State Action

MJM, QBSL, Bruce Heurlin (counsel of record for the Grossmans), State trial court Judge, Judges of the Arizona Court of Appeals (Division II), and Justices of the Arizona Supreme Court, were all State Actors in the case at bar before this Court. Davidsons have asserted the state involvement necessary to transform the private acts of MJM, QBSL, Bruce Heurlin, the state trial court judge, the judges of the Arizona appeals court, and the justices of the Arizona Supreme Court, into state action covered by 42 USC Section 1983, Section 1985, and Section 1988. Withdrawal of counsel in the State Action deprived Davidsons of federal constitutional rights. Davidsons sustained and continue to sustain ongoing irreparable injury in the State court system.

Actual Malice and Willful Misconduct

By information, belief, and the totality of the circumstances, MJM and QBSL knew the content and substance of the Prosecution Memorandum, prior to filing their Motion to Withdraw as counsel *of record*. Yet, MJM and QBSL agreed [with each other] to continue to refuse to bring Arizona fraud, Arizona RICO, and federal RICO actions, on behalf of their then clients, the Davidsons, despite repeated requests by the Davidsons to bring such actions.

Both a general retainer and a special retainer prohibit the acceptance of adverse employment or the performance of adversary services by the attorney. ***After being retained, an attorney owes the client his or her undivided allegiance. Once an attorney has received the confidence of a client, the attorney may not act for both the client and for another whose interests are in the slightest way adverse or conflicting.*** An

attorney, without just cause, may not abandon a case without the consent of the client.

After MJM changed law firms (he joined the law firm of QBSL during his representation of the Davidsons in the State court proceeding), he stated in writing in a letter of January 15, 2001, from MJM to the Davidsons, *"I do not expect this [his change in law firm] to affect or impair in any way my ability to continue effective representation for you."* MJM and QBSL abandoned their clients (the Davidsons) with their Motion to Withdraw, just four months before the scheduled trial date, under color of Arizona Rule 5.1. Both before and especially after MJM's change of law firm announcement [per letter of January 15, 2001, from MJM to Davidson], Davidsons have never felt reasonably assured that the principles of loyalty to the client or confidentiality were not compromised by MJM or QBSL.

In retrospect, it is a reasonable inference to postulate that both MJM's employment with the law firm QBSL and MJM's candidacy for positions on the Arizona bench, were *bribes* and that these bribes (*and MJM's acceptance of these bribes*) were overt acts to conceal a racketeering conspiracy which has been ongoing for nearly two decades, in both New York and Arizona. See Issues #2 and #3 from Davidsons' Petition for Writ of Certiorari before Judgment (Supreme Court Docket #04-537), cert. denied. See Appellees' Supplemental Excerpts of Record (SER), Volume 1, Tab 1, at pages 1-19, in Ninth Circuit Case No. 03-17342. See Appellees' SER, Volume 2, Tab 20, at pages 448-485. See Appellees' SER, Volume 2, Tab 21, at pages 486-505.

MJM's and QBSL's Motion to Withdraw as counsel of record (December 17, 2001), when viewed against the backdrop of the Prosecution Memorandum (November 20, 2000) provides prima facie evidence of actual malice and willful misconduct by the attorney (MJM) and his law firm (QBSL) towards his clients (Davidsons). There was not *"good cause appearing therefore"* upon which to base the Trial Judge's Order of January 11, 2002. The reasons given for attorney withdrawal in MJM's and QBSL's Motion to Withdraw are false. MJM and QBSL have defrauded the Trial Court by alleging that ethical considerations motivated their Motion to Withdraw. MJM and QBSL actually slandered their then clients (the Davidsons) in their Motion to Withdraw, by maliciously characterizing their clients' objectives as being unprofessional, imprudent, unethical, and repugnant. This intentional misrepresentation inflicted irreparable harm upon the Davidsons once the motion was filed. By information and belief, MJM and QBSL knew the substance and content of the Prosecution Memorandum, *prior to filing their Motion to Withdraw as counsel of record*. See Motion for Judicial Notice of Prosecution Memorandum, on June 11, 2004, in Ninth Circuit Case 04-15304.

Exceptions to Doctrine of Judicial Immunity

If federal courts adopt a per se rule and dismiss all Section 1983 complaints against [attorneys], the most egregious behavior by [an attorney], even if unquestionably the result of pressures by the State, will not be cognizable under Section 1983. Under the doctrine of absolute judicial immunity, judges are subject to suit only for (1) non-judicial actions, i.e. actions not taken in the judge's judicial capacity, or (2) *"actions, though judicial in nature, taken in the complete absence of all jurisdiction". "The judge must have jurisdiction over the person and subject matter if he [she] is to be immune from suit for an act performed in his [her] judicial capacity." "A third element is the power of the Court to render the particular decision which was given." " The third element in the concept of jurisdiction as used in the context of judicial immunity necessitates an inquiry into whether the defendants' action is authorized by any set of conditions or circumstances. This inquiry begins with an examination of the statute under which the defendant presumed to act." "There are actions of purported judicial character that a judge even when exercising general jurisdiction, is not empowered to take."* See *Briley v. State of California*, 564 F.2d 849.

III. Davidsons were precluded from raising federal law claims in the state forum

State law barred Davidsons from obtaining interlocutory review of their Due Process claim in State courts. Arizona court rules did not permit raising the Rule 5.1 constitutional claim in the state court proceedings. Davidsons did not have an opportunity to raise their federal claim in state court because they were procedurally barred from raising such claims. The state court's application and enforcement of the facially unconstitutional Arizona Rule 5.1 is of such magnitude as to justify the federal court's intervention in state affairs and is sufficient to overcome general abstention principles. *J.P. v. DeSanti,* 653 F.2d 1080 (1981).

On December 29, 2004, the Arizona Court of Appeals (Division Two) denied a stay of the State court proceedings. On January 5, 2005, Division Two declined to accept jurisdiction over Davidsons' Petition for Special Action to Arizona Court of Appeals (2 CA-SA 04-0105), filed on December 22, 2004. On February 16, 2005, the Arizona Supreme Court denied a stay of the State court proceedings. On July 19, 2005, the Arizona Supreme Court denied Davidsons' Petition for Review of a Special Action Decision of the Court of Appeals (CV-05-0052-PR).

Davidsons presently have a fully-briefed Appeal (2 CA-CV 2005-0011) before Arizona Court of Appeals (Division II). ***Where state courts have regularly applied an unambiguous statute, there is no need for a federal court to abstain from determining the constitutionality of the statute until state appellate courts have had an opportunity to construe it***. *City of Houston, Tex. v. Hill*, 482 U.S. 451 (1987).

Denial of Interlocutory Review

An interlocutory appeal may be heard if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. ***Davidsons' interlocutory appeal (2 CA-CV 2002-0051) in the State court proceeding was properly appealable under the collateral order exception to the final judgment rule***. See *Whiting v. Lacara*, 187 F.3d 317 ("*the collateral order doctrine permits appeal from an order denying leave to withdraw as counsel*"). See *Fidelity National Title Insurance Co. v. Intercounty National Title Insurance Co.*, 310 F.3d 537 ("*the Court of Appeals held that denial of attorney's motion to withdraw was immediately appealable as collateral order, and court's order denying attorney' motion to withdraw was abuse of discretion*"). Davidsons were barred from raising federal claims in the State court proceeding. Davidsons affirm that in the State court proceeding, Arizona Court of Appeals [2CA-CV 2002-0051], and Arizona Supreme Court [CV-03-0138-PR], they did not have an opportunity to raise their federal claim in state court because they were procedurally barred from raising such claims. *Younger* abstention is not appropriate when state law imposes procedural barriers to raising the constitutional claims in state court proceedings.

Incompetent State Forum

Unsigned Minute Entry Orders are not appealable under Arizona law. The Trial Judge's unsigned Minute Entry Order of April 29, 2004, denying the Davidsons' Motion to Amend Defendants' Answer, to add Counterclaims, and add Parties, ***greatly prejudiced the Davidsons***, by denying Davidsons the right to argue and prove pattern of misconduct and conspiracy in the State court proceeding. *This ruling was intended to prevent the Davidsons from ever raising their concerns regarding the federal Constitutionality of the PDUFA before an Arizona court.*

The State court's denial on April 29, 2004, of the Davidsons' Motion to Amend Defendants Answer, to Add Counterclaims, and Add Parties, represents a complete denial of a State forum in which

to raise the Davidsons' federal Constitutional concerns as to the PDUFA. ***The State court's ruling of April 29, 2004, is why the PDUFA is not presently at bar in the State court proceeding. The federal constitutionality of the PDUFA cannot now be reached on appeal to the Arizona Court of Appeals. The Arizona trial court has proven itself to be an incompetent forum in which to timely raise the Davidsons' concerns regarding the federal Constitutionality of the PDUFA.*** The third Middlesex prong is lacking in both federal district court proceedings.

IV. Withdrawal of counsel in the State Action deprived Davidsons of federal constitutional rights

The State trial court's signed Order of January 11, 2002, denied the Davidsons important Constitutional rights including the right to Due Process, right to Equal Protection, right to Contract, right to freedom from arbitrary Takings, and the *presently-enjoyed* right to retained legal counsel in a civil proceeding.

Structural Errors

The State trial judge's dismissal of Davidsons' retained counsel of record violates due process and amounts to structural error, and this cannot be harmless error regardless. This constitutional "error" had a profound prejudicial impact on the outcome of Davidsons' case. Both the denial of counsel and judicial bias were structural errors which affected the composition of the record in the State court proceeding. See *Sullivan v. Louisiana*, 113 S.Ct. 2078.

The appearance of bias and partiality was created by actual knowledge of MJM's candidacy for the Arizona bench by the State Actors, prior to rulings on Davidsons' interlocutory appeal by the Arizona Court of Appeals and Petition for Review to Arizona Supreme Court, and prior to final Judgment in the State court proceeding. See *Waller v. U.S.*, 112 S.Ct. 2321. Violations of 28 USC Section 455(a) which require judges to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned does not require scienter. Davidsons move this Court for relief from the final Judgment in the state court proceeding under Fed. R. Civ. P. 60 (b)(6). 28 USC Section 455 (a) required the State court trial judge to recuse herself, and this statute can be applied retroactively. The risk of injustice to Davidsons, risk of injustice in other cases if relief is denied, and risk of undermining the public's confidence, are all far too great to deny vacatur of the final Judgment of the State trial court under Rule 60 (b) (6). ***The final Judgment in the State court proceeding should be vacated based on an appearance of impropriety that***

permeates the entire proceeding. The reasonable person standard applies. *"The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact".* ***MJM's candidacy for the Arizona bench while Davidsons' interlocutory appeal was pending gives rise to estoppel as a matter of law.*** See *Liljeberg v. Health Services Acquisition Corp*, 108 S.Ct. 2194.

If Davidsons had counsel and if Davidsons were tried by impartial adjudicators, there is a strong presumption that any *"errors"* that may have been made are subject to harmless error analysis. Davidsons had neither counsel nor an impartial adjudicator in the State court proceedings. The *"erroneous"* dismissal of Davidsons' counsel does compare with the kinds of errors that automatically require reversal. The error (attorney dismissal) was *"so basic to a fair trial"* that it could never be harmless. Malice by MJM and the Trial Judge towards the Davidsons may be presumed from predicate facts. Denial of counsel can never be harmless error because it either aborts the basic trial process or denies it altogether. ***Intentional discrimination in the dismissal of Davidsons' retained counsel is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the state to prevent***. The coerced dismissal of Davidsons' counsel vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment (this is constitutional error that may not be deemed harmless).

It is particularly striking in the State judicial proceedings to compare the Courts' apparent willingness to forgive constitutional errors that rebound to the trial judge's benefit with the Courts' determination to give preclusive effect to trivial errors that obstructed Davidsons' ability to raise meritorious constitutional arguments.

Denial of "the Basic Trial Process"

There exist a class of constitutional errors that *"necessarily render a trial fundamentally unfair"* and these are not amenable to harmless error analysis. Harmless error analysis *"presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury".* Davidsons were denied representation by counsel, denied an impartial judge, and denied a jury, in the State court proceedings. Davidsons were denied *"the basic trial process"* in the State court proceedings. Archetypal examples of constitutional errors are denial of the right to counsel and trial before a biased judge. Effective defense counsel and an impartial judge play central roles in the basic trial process. A jury is an equally central entity under

the 6th and 14th Amendments. See *Rose v. Clark*, 106 S.Ct. 3101. ***Davidsons have overcome the presumption of impartiality of the State court adjudicators by demonstrating the existence of circumstances indicating a probability of bias too high to be constitutionally tolerable***. See *McIlwain v. U.S.*, 104 S.Ct. 409.

V. The "*extraordinary circumstances*" exception to *Younger* abstention applies

The *Younger* doctrine is inapplicable if the state tribunal to which the federal claims would be presented is found by the federal court to be incompetent by reason of bias to adjudicate the issue pending before it. *Gibson v. Berryhill*, 411 U.S. 564 (1973). The *Gibson* exception allows a federal court to intervene where the state adjudicator is so biased as to be incompetent to adjudicate the matter and where the petitioner shows that abstention has resulted in irreparable harm. (***See Issue #2, #3. and #4 above***). The due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.

No. 04-1687

FILED
OCT 2 3 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ROBERT M. DAVIDSON and
VANESSA E. KOMAR,
Petitioners
v.

VIVRA INC,
MICHAEL J. MEEHAN,
QUARLES BRADY STREICH LANG LLP,
et al
Respondents

On Petition For Writ Of Certiorari
As to Two Final Judgments of the Ninth Circuit
United States Court of Appeals

PETITION FOR REHEARING

ROBERT M. DAVIDSON
Petitioner Pro Se
1009 N. 4th Street, Ste. B
Longview, TX 75601
903-758-1900

PETITION FOR REHEARING

Petitioners [referred to herein as "Davidsons"] submit this petition for rehearing pursuant to this Court's Rule 44.2 because of "*intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented*". Davidsons filed Petition for Writ of Certiorari (Docket Case No. 04-1087) on June 13, 2005, and Supplemental Brief on August 22, 2005. Certiorari was denied by this Court on October 3, 2005.

I. The final judgments of the Ninth Circuit United States Court of Appeals are void as moot

Final Judgment and Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 03-17342) and Final Judgment and Memorandum Decision of April 4, 2005, from Ninth Circuit U.S. Court of Appeals (# 04-15304) are void as moot because the Orders of November 24, 2003 (U.S. District Court, Arizona District, Docket No. 56, Civil Case # CV-03-00110-FRZ and February 2, 2004 (U.S. District Court, Arizona District, Docket No. 9, Civil Case # CV-03-00580-FRZ), which dismissed Davidsons' federal causes of action, were ***acts in clear absence of all jurisdiction***. See *Am.Jur. Civil Rights*, Section 105, *C.J.S. Judges*, Section 208, *Am.Jur. Judges*, Section 75, and *C.J.S. Judges*, Section 207. See also *Sharp v. Bivona*, 304 F.Supp.2d 357, *Mireles v. Waco*, 112 S.Ct. 286, *Stamp v. Sparkman*, 98 S.Ct. 1099, and *Hale v. Lefkow*, 239 F.Supp.2d 842.

Federal District Court trial judge Frank R. Zapata had actual knowledge of Michael J. Meehan's ("MJM's") candidacy for the Arizona bench prior to the final Orders by Judge Zapata which dismissed both of Davidsons' federal causes of action. Violations of 28 U.S.C. Section 455(a) can be applied retroactively. ***Only one inference can reasonably be drawn from the evidence. Estoppel may be a question of law, when the facts are not in dispute or are beyond dispute***. See *28 Am. Jur.2d Estoppel and Waiver Section 188.* This Court is referred to the Affidavit and Attachments to Davidsons' Petition for Review to the Arizona Supreme Court on September 21, 2005.

II. The Ninth Circuit United States Court of Appeals applied the wrong standard of review to Davidsons' Appeals

The Ninth Circuit holdings in Davidson v. Meehan, 127 Fed. Appx. 312, have effectively adopted a per se rule which permits dismissal of all Section 1983 complaints against attorneys [and judges], thereby fostering [if not actually encouraging] the most egregious behavior by attorneys [and judges], even if unquestionably the result of pressures by the State. The Ninth Circuit held that privately-retained attorney and law firm cannot violate constitutional rights of clients. This ruling is certain to have been well received by the State Actors in the State Action.

In the federal court proceedings, federal Judge Zapata's dismissal of Davidsons' federal causes of action under color of the abstention doctrine of *Younger v. Harris* was not just "*clearly erroneous*". It was *willfully malicious* towards the whistle-blowers (the Davidsons) and an unconscionable abdication of jurisdiction over Davidsons' federal causes of action (CV-03-00580-FRZ and CV-03-00110-FRZ). ***Judge Zapata's dismissals of Davidsons' federal court proceedings were "actions, though judicial in nature, taken in the complete absence of all jurisdiction"***.

To wit, Judge Zapata was incapable of "*holding the balance true*" between Davidsons' rights and MJM's rights, when he had actual knowledge of MJM's candidacy for the Arizona bench. Judge Zapata's rulings favored MJM's judicial ambitions at the expense of Davidsons' right to fair trial. These rulings represent willful malfeasance by Judge Zapata towards the Davidsons. These rulings give rise to estoppel as a matter of law. Judge Zapata violated his duty to recuse himself when Section 455 (a) applied. Judge Zapata's judicial bias represents structural error in the constitution of the trial process. *"Structural errors" are defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards* ***and require reversal***. See *State v. Dorsey*, 701 N.W.2d 238.

III. Predicate Facts

Davidsons ***very recently*** *(August 2005) learned that Michael J. Meehan ("MJM") was candidate for several vacancies on the bench of Division II of Arizona Court of Appeals ("Division II") and Arizona Supreme Court from 2002 to 2003, both during and prior to the time when Davidsons' federal causes of action [CV-03-00110-FRZ and CV-*03-00580-FRZ) were *before federal trial* Judge *Frank R. Zapata.* Two *federal judges recused themselves from Davidsons' federal cause of action (CV-03-00580-FRZ) against MJM* and QBSL (Judge John M. Roll on December 2, 2003, and Judge David C. Bury on December 29, 2003) before the case was reassigned to Judge Frank R. Zapata on December 29, 2003. Judge Zapata dismissed Davidsons' federal causes of action on November 24, 2003 (U.S. District Court, Arizona District, Docket No. 56, Civil

Case # CV-03-00110-FRZ) and February 2, 2004 (U.S. District Court, Arizona District, Docket No. 9, Civil Case # CV-03-00580-FRZ). Prior to the aforementioned dismissals, Judge Zapata had actual knowledge of MJM's candidacy for vacancies on the Arizona bench. Malice by Judge Zapata toward the Davidsons may be presumed from predicate facts.

This Court is referred to the Affidavit and Attachments to Davidsons' Petition for Review to the Arizona Supreme Court on September 21, 2005, for copies of the newspaper article from the April 15, 2002, issue of the Tucson Citizen, entitled "*7 Tucsonans up for high court seat*". See December 2002, Volume 22, Number 12, page 1, issue of the Maricopa Lawyer. See May 2002, Volume 22, Number 5, page 1, issue of the Maricopa Lawyer. See January 2003, Volume 23, Number 1, page 1, issue of the Maricopa Lawyer. See April 8, 2002, and April 25, 2002, press releases, downloaded from the archives of the Arizona Supreme Court, entitled "*15 Applicants Apply for Arizona Supreme Court Position*" and "*Public Input Sought on Candidates for Supreme Court*", respectively.

These facts are readily verifiable because copies of the newspaper press releases from 2002 and 2003 can be found and downloaded directly from the Arizona Supreme Court internet website. Copies of the newspaper articles can be obtained from archive departments of the Maricopa Lawyer and the Tucson Citizen. These facts provide this Court with more than just vague conclusory allegations of structural bias in the federal court proceedings.

Davidsons lacked knowledge and the means of knowledge of the truth as to the facts in question [referenced above]. Davidsons relied, in good faith, on the conduct or statements of federal trial judge Frank R. Zapata. Davidsons acted or refrained from acting because of the conduct or statements of Judge Zapata. Davidsons action or inaction was of such a character as to cause a change in their position or status to their injury, detriment, and prejudice. Davidsons did not learn of the above-mentioned facts, until very recently (August 2005), due to the fact that the Davidsons have resided in Texas since January 2002, and had no reason to subscribe to the Tucson Citizen, nor did they have any reason to subscribe to the Maricopa Lawyer, nor any reason to search the archives of the Arizona Supreme Court. ***It is only by the Grace of God that Davidsons learned of these facts at all. Davidsons exceptionally diligent effort in monitoring the lawsuit [and Divine Intervention] establish the exceptional circumstances justifying relief***. While motions for relief under Federal Rule of Civil Procedure 60(b)(6) should be made to the court that rendered the judgment, Davidsons did not learn of MJM's candidacy for the Arizona bench until August 2005. Thus Davidsons did not learn until *very recently* that federal trial judge

Frank R. Zapata with a high degree of likelihood [virtual certainty] had *actual knowledge* of MJM's candidacy for the Arizona bench while Davidsons' federal cases were pending. Davidsons have made a strong showing of *actual bias* by the federal trial judge in the federal court proceedings.

IV. Bias and partiality in the federal court proceedings

The appearance of bias and partiality was created by actual knowledge of MJM's candidacy for the Arizona bench by federal trial judge Frank R. Zapata, prior to the rulings which dismissed Davidsons' federal causes of action. See *Waller v. U.S.*, 112 S.Ct. 2321. Violations of 28 USC Section 455(a) which require judges to disqualify themselves in any proceeding in which their impartiality might reasonably be questioned does not require scienter. Davidsons move this Court for relief from the final Judgments in the federal court proceedings under Fed. R. Civ. P. 60 (b)(6). 28 USC Section 455 (a) required the federal court trial judge to recuse himself, and this statute can be applied retroactively. The risk of injustice to Davidsons, risk of injustice in other cases if relief is denied, and risk of undermining the public's confidence, are all far too great to deny vacatur of the final Judgments in the Federal trial court under Rule 60 (b) (6). The final Judgments in the Federal court proceedings should be vacated based on an appearance of impropriety that permeates the entire proceedings. The reasonable person standard applies. "*The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact*". MJM's candidacy for the Arizona bench while Davidsons' federal court proceedings were pending gives rise to estoppel as a matter of law. See *Liljeberg v. Health Services Acquisition Corp*, 108 S.Ct. 2194.

V. Structural errors in the federal court proceedings

"Structural errors" are defects in the constitution of the trial mechanism, which defy analysis by harmless-error standards ***and require reversal***. See *State v. Dorsey*, 701 N.W.2d 238. See *Arizona v. Fulminante*,111 S.Ct. 1246. See *In re: Initial Public Offering Securities Litigation*, 174 F.Supp.2d 70. Unlike federal judges John M. Roll and David C. Bury, Frank R. Zapata did not recuse himself from Davidsons' federal cause of action (CV-03-00580-FRZ) against Davidsons' former attorney and his law firm. The due process clause of the U.S. Constitution entitles a person to an impartial and

disinterested tribunal in both civil and criminal cases. The federal court proceedings violated Davidsons' constitutional rights. Submission to a fatally biased adjudicator constitutes ongoing, independent injury that requires immediate judicial relief. The test for recusal is an objective one and asks whether, from the perspective of "*the average person on the street,*" a reasonable man knowing all of the circumstances "*would harbor doubts about the judge's impartiality.*" See *U.S. v. Poludniak*, 657 F.2d 948. Federal trial judge Zapata is estopped from dismissing Davidsons' federal court proceedings as a matter of law. Judge Zapata's inexcusable failure to recuse himself when required to do so by 28 U.S.C. Section 455 (a) constitutes an extraordinary circumstance warranting relief once the failure came to light. By failing to recuse himself, Judge Zapata's final Judgments which dismissed both of Davidsons' federal causes of action are judicial acts "*in clear absence of all jurisdiction*" for which there should be no immunity from liability in connection with such acts.

VI. Abdication of federal jurisdiction

Davidsons are not the only victims of Judge Zapata's willful misconduct. The "*endangered and dead*" victims referred to in Davidsons' Petition for Writ of Certiorari before Judgment (U.S. Supreme Court Docket Case # 04-537, certiorari denied on January 10, 2005), Issue # 2, at page 17, paragraph 1, had to collectively shudder when Judge Zapata dismissed Davidsons' federal causes of action (CV-03-00110-FRZ and CV-03-00580-FRZ). A foreseeable consequence of his abdication of federal jurisdiction, is that the harm (intentional endangerments and deaths) made possible under color of the Prescription Drug User Fee Act ("PDUFA") will continue unabated and evade review.

CERTIFICATION UNDER RULE 44.2

Pursuant to this Court's Rule 44.2, Davidsons hereby certify that this Petition for Rehearing is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Davidsons hereby also certify that this Petition for Rehearing is presented in good faith and not for delay.